OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

RECOMMENDATIONS FOR ACHIEVING THE EXECUTIVE ORDER 11246 PROGRAMS GOAL

DECEMBER 8 AND 10, 1981

Part 2

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OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

TUESDAY, DECEMBER 8, 1981

U.S. Senate,
Committee on Labor and Human Resources,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 4228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the committee) presiding.

Present: Senators Hatch, Quayle, Hawkins, and Kennedy.

Staff present: John Florez, professional staff member.

Opening Statement of Senator Hatch

The Chairman. Last July when we opened our oversight hearings Executive Order 11246, I said their purpose was to examine how effective the OFCCP had been in fulfilling the intent of Executive Order 11246 and to propose solutions as needed. At that time I emphasized intent because bureaucracies tend to lose sight of their intended mission. They become preoccupied with process rather than results. I also said this committee would be looking for solutions rather than spending all its time looking at problems.

Our recently completed set of hearings focused on reviewing how the current regulations affected women, minorities, and Federal contractors. Generally our hearings revealed that:

One, a heavy majority of Americans from all walks of life are supportive of the initial intent of Executive Order 11246—to eliminate the barriers of discrimination and to increase employment opportunities for women and minorities.

Two, the OFCCP started compliance reviews with a presumption of guilt on the part of Federal contractors, a presumption that has not always been justified.

Three, regulations put contractors in a no-win situation and set them up for bureaucratic blackmail.

Four, Federal contractors have been needlessly harrassed by the OFCCP staff.

Five, the OFCCP was preoccupied with process, numerical parity, and findings of an affected class rather than evaluating good faith efforts.

In short, what those hearings told us is that there has to be a better way of carrying out the initial intent of Executive Order

11246. It is for this reason that the committee is holding hearings today and Thursday. We are looking for answers.

There are those who are concerned that this administration is not committed to civil rights because agencies such as the OFCCP and the EEOC are being reviewed. I would urge those who hold this view to consider our oversight actions as indicators of our shared interests in civil rights. I do not think any bureaucracy should be immune from oversight, and certainly not these two which have received so much criticism and are receiving so much criticism at the present time.

Recent administration actions to curtail Federal job training efforts should not be read as an effort to retreat from the defense of rights. I should urge these critics to be suspicious of anyone who suggests that the only path to racial integration must be through great expenditures of Federal money. The Federal Government cannot be solely responsible for work that is so important to the well-being of the Nation. All Americans and all of America's businesses have to be involved.

There is a definite role for the Federal Establishment to play and there is a place for Federal civil rights legislation and directives. We cannot argue that. However, after 17 years of civil rights legislation, rulemaking, and Executive orders, it is time to review their effectiveness and either get rid of them or revitalize them as problem-saving tools. We cannot afford excuses for maintaining bureaucracies for their own sake. The current state of the American workplace is fraught with conflict, not only between employer and employee but, as one previous witness said, "having to protect yourself from your own Government."

After 17 years, it is time to reevaluate how this crazy-quilt of legislation and regulations complement each other, where they overlap, where they are counterproductive, and where they need strengthening. We plan to take on that challenge in this committee and do something about it.

As you know, I have been a loud critic of some equal employment and affirmative action programs. I have been a critic because these issues affect the lives of all Americans and the basic values of our society, yet there has been limited public debate. Our national policies are to promote the general welfare of our people. Consequently, then, they must undergo careful scrutiny by our elected officials. It is essential that we take on this task if we are committed to furthering civil rights in the conditions facing us in the eighties. It is a new era, and we need new ideas.

We have charged each of our witnesses today and Thursday to answer the key question which prompted the creation of the Executive Order 11246 as we know it today: That is, if we are committed to the national goal of improving employment opportunities for women and minorities, how best should we pursue this goal?

By posing this fundamental question, we will not simply be preoccupied with perpetuating a program for its own sake. Rather, we are taking a broader view of what else we should be doing to realize what is still an important national goal. These witnesses bring a wider, divergent, and I anticipate, a creative approach to furthering the common concerns which bring us together.

Because we wanted to hear from as many people as possible, we have asked our witnesses to summarize their written testimony within 5 and no more than 10 minutes, and I will interrupt after 10 minutes so that we can leave some time for questions. Otherwise, it is going to be very difficult for me to sit through the full day of hearings because we have a Judiciary Committee meeting at 11 o'clock this morning, and almost every bill on the agenda happens to be a bill I am sponsoring. Therefore, it is just one of those common, constant conflicts that we go through.

Senator Hawkins will be joining us later on but has asked me to introduce her opening statement at this point.

I would also like to submit prepared statements by Senator Humphrey and Congresswoman Cardiss Collins for the record at this time.

[The statements referred to follow:]

OPENING STATEMENT OF SENATOR HAWKINS

Senator **HAWKINS**. Mr. Chairman, past hearings by this committee have focused on the abuses of the Office of Federal Contract Compliance at the Department of Labor. While I think it is important to bring these abuses to the public's attention. It is not my intention or desire to eliminate the OFCCP or reduce the Government's involvement in affirmative action. Many of the criticisms that I have had concerning OFCCP have been based on my belief that OFCCP's current methods are harming the entry of women and minorities in the workforce by creating ill will and resentment against them.

I am very interested in the testimony to be presented today because its focus will be on methods to improve the employment opportunities for women and minorities. I feel that improvements can be made in the Government's programs that will encourage affirmative action by businesses without destroying the effectiveness of the current OFCCP program.

I hope that today's witnesses will offer suggestions on how the Government's role in encouraging equal employment, equal treatment and job mobility to all American citizens can be improved. I look forward to hearing the testimony presented today.

PREPARED STATEMENT OF SENATOR HUMPHREY

Senator **HUMPHREY**. Mr. Chairman, I regret that other committee responsibilities will prevent me from attending this morning's hearing on the Office of Federal Contract Compliance Programs. The oversight of these affirmative action programs is an important function of this committee. I look forward to reading the testimony of the witnesses concerning ways to pursue the goal of improving opportunities for women and minorities.

TESTIMONY OF U. S. REPRESENTATIVE CARDISS COLLINS-TUESDAY DECEMBER 8, 1981
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

MR. CHAIRMAN, I THANK YOU FOR ALLOWING ME TO SUBMIT TESTIMONY THIS MORNING. I RECOGNIZE THE COMMITTE'S MANDATE TO REVIEW AFFIRMATIVE ACTION REGULATIONS AND THANK YOU FOR THE OPPORTUNITY TO EXPRESS MY DEEP COMMITMENT TO THIS CONCEPT, BOTH IN PRINCIPLE AND IN PRACTICE.

EXECUTIVE ORDERS 11246 AND 11375 OFFICIALLY SET THE STAGE FOR AFFIRMATIVE ACTION PRINCIPLES WITH RESPECT TO THE FEDERAL GOVERNMENT AND BY EXTENSION TO THE PRIVATE SECTOR. THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS WAS DESIGNED TO GUARANTEE THAT FEDERAL CONTRACTORS ADHERE TO THESE ORDERS, WHICH WERE INTENDED TO INCREASE THE PROPORTION OF MINORITY AND FEMALE CONTRACTORS AND EMPLOYEES.

IT IS BEING ALLEGED THAT THE PROGRAMS HAVE ALREADY MET THEIR GOALS AND ARE NOW NOTHING MORE THAN ANOTHER BURDENSOME SECTOR OF THE BUREAUCRACY, BOGGED DOWN WITH PAPER WORK. THIS UNFORTUNATE VIEWPOINT HAS LED TO A CONCERTED ASSAULT ON BOTH THE PRINCIPLE AND PRACTICE OF AFFIRMATIVE ACTION, WHICH HAS BEEN A MAJOR CONTRIBUTORY FACTORY IN HIRING WOMEN AND MINORITIES IN THE LABOR FORCE. THE INITIAL PURPOSE WAS TO REDRESS TWO CENTURIES OF INEQUALITY BY A SYSTEM THAT HAD SYSTEMATICALLY EXCLUDED MINORITIES AND WOMEN FROM FULL PARTICIPATION IN AMERICAN LIFE. ATTEMPTS TO ELIMINATE BACK PAY AS A REMEDY FOR EMPLOYER DISCRIMINATION AND ADJUSTMENT OF THE 8 FACTOR ANALYSIS USED TO DETERMINE AVAILABILITY OF MINORITY-GROUP MEMBERS AND WOMEN FOR JOBS ARE A TOTAL NEGATION OF THE AFFIRMATIVE ACTION PRINCIPLES. THESE RULES WERE CREATED OUT OF A NEED TO AMELIORATE PREVIOUS PRACTICES WHICH WERE DESIGNED TO STIGMATIZE, EXCLUDE, OR DISPENSE INFERIOR TREATMENT TO WOMEN AND MINORITIES.

The term "affirmative action" was first coined by President John F. Kennedy; it was interpreted as an all-out effort to redress inequities that women and minorities have been subject to for years. From that time on it has been a source of great inspiration, confidence and hope to those who were downtrodden and disallusioned. More recently, the Supreme Court decision Regents of the University of California vs. Bakke, although disallowing strict quotas in certain instances, did uphold the principle of affirmative action.

There has always been a stigma attached to this phrase, because it was deemed to symbolize quotas; this is erroneous, it was primarily intended to improve past injustices. The term does not connote a free ride, it means equal access to employment and mobility in status and wages. The ability to enter the workforce, be promoted and receive equitable pay increases has long been a major goal of minority groups. The relaxation or invalidation of these executive orders in the federal government, or in any other area, would be tantamount to the destruction of years of progress.

There are those that dispute the effectiveness of Affirmative Action. They are threatened by the progress of minorities and women and would deny them further gains. While I recognize the need to monitor affirmative action programs as they now exist, I vehemently oppose attempts to weaken their implementation.

Now is a critical time for compliance. I contend that the federal government's commitment to equal employment opportunity and affirmative action must remain strong if we are to be a viable and productive nation and if we expect the private sector to lend a hand in achieving this goal.

The CHAIRMAN. We are very happy to welcome as our first witness this morning Mr. Barry Goldstein of the NAACP Legal Defense Fund, from New York, N.Y. Mr. Goldstein, we are happy to have you here.

STATEMENT OF BARRY L. GOLDSTEIN, ASSISTANT COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, N.Y.

Mr. GOLDSTEIN. Thank you, Mr. Chairman. I want to thank you for the opportunity to testify on this important matter. I know that you have a long and distinguished list of witnesses today, and I shall endeavor to be as brief as possible.

The CHAIRMAN. Well, let's make it clear that we will put all written statements in the record as though fully delivered, so we do appreciate summaries. The purpose is, of course, to build the record so that we can get all sides of this issue, as much as we can, into this hearing record.

Mr. GOLDSTEIN. To that end, we have provided the committee with a fairly extensive set of written comments.

In order to discuss what to do in 1981, I think it is absolutely necessary to discuss what has occurred in the employment practices of this country over the last 300 years; to look at the history of discrimination in employment, which has been long; and to look at the history of the effort to create fair employment, which has been short.

If we were dealing with individual acts of discrimination, of overt discrimination by bigots, then our direction would be one way: It would be looking toward intentional discrimination and giving remedy to the individual victims of that intentional discrimination. However, as this committee said in 1972 in an extensive review of the fair employment laws, "This view has been shown to be false." Rather, we are faced with a problem of systemic discrimination which is clear from the history of discrimination in all aspects of employment, private and governmental.

Bill Coleman, former Secretary of Transportation, has called this the "malevolent" tradition of American employment. If one is familiar with American industry, whether it be steel, tobacco, paper, craft jobs, one could say, what are the historically black jobs, what are the historically white jobs; what were the jobs from which women were excluded and which were the jobs reserved for white males.

There has been an attempt, and a constructive one, to break down this pattern of segregation. However, centuries of segregation have left their mark and we must deal with the realities of the effects of this pattern of discrimination.

What to do about the problem? Since 1941 the Federal Government has dealt with attempting to create fair employment. It has been a bipartisan effort. Eight Presidents have supported and expanded the Executive order program. Six Presidents have issued Executive orders. A Democratic President issued the first order. A Republican Presidential committee in 1959 recognized the need for positive or affirmative action. A Democratic President, President Kennedy, acted upon that Republican review and put the requirement of affirmative action in the Executive order. A Republican President, President Nixon, then was responsible for the first extensive use of goals and timetables and numerical measures to evaluate gains in compliance with the fair employment laws. Again, this has been bipartisan.

Repeatedly, Congress and Presidential committees have issued reports which have recognized the following general principles, which I urge be retained: that voluntary compliance alone does not work. That is the history of civil rights laws in this country; it is the history of civil rights laws in employment and in other areas. Strong enforcement is necessary as a spur and catalyst to following the national policy of fair employment.

There need to be several methods of enforcement. Government litigation is important but has never lived up to its potential. Private enforcement must be retained and encouraged. In the 12-month period ending June 1981 there were 6,200 fair employment cases filed in this country. Less than 250 were filed by the Federal Government; the rest were filed by private lawyers and private parties seeking to enforce the principle of fair employment.

The major decisions in the Supreme Court—*Griggs* v. *Duke Power, Albemarle Paper Co.* v. *Moody, Franks* v. *Bowman Transportation*—have all been brought by private parties. However, the Government plays an absolutely essential role, for it is only the Government that can systematically develop a plan for ending the problem of discrimination. The Executive order there plays a critical role, for it is in the Executive order that change can be encouraged without necessarily finding discrimination. It can be and should be a cooperative effort of supervision by the Government to encourage industry and unions to self-analyze and change. Last, reasonable affirmative action is necessary to undo the affirmative discrimination of centuries.

Let me turn quickly to the results that have been achieved. I am not going to announce that discrimination has ended. I would be out of a job. That would be OK. I would wish the day that that occurs.

The CHAIRMAN. I think you will have a job for many years to come, from what I have seen.

Mr. GOLDSTEIN. However, we have achieved results and I think it is important to look at what those results are.

At the end of World War II, the Fair Employment Practices Committee said that there was an absolute necessity for strong compliance and enforcement and the need for a Fair Employment Practices Act. The committee predicted that civil discord and international embarrassment to the United States would occur if there was no such strong measure passed by the Congress. Unfortunately, the fair employment law died in a Senate filibuster in 1948, 1949, and 1950, and the prediction of civil discord and international embarrassment was realized.

However, in the 1960's this country can take credit for moving strongly in the area of fair employment and making substantial gains. We often hear cited, we ourselves cite the tremendous difference in unemployment between blacks and whites, the earnings gaps between blacks and whites and men and women. These are dramatic problems; they need study, they need action, and I commend the committee for looking at these matters.

However, there has been change, and let us not deny the results that this country has achieved. Anyone familiar with American industry knows that in the sixties and seventies traditional barriers have been lowered. Let me be specific: In the trucking industry, blacks are now over-the-road drivers which they were not before. In foundries, blacks are now in craft positions which they were not before. In tobacco, they are in machining whereas before they had only been in the stemmery process. In steel, they are in the machine shop as well as the blast furnace. In craft industry, they are in apprentice and journeymen positions, not just laborers.

Let me give some numbers: In the professional and technical category of the U.S. Census, the highest general category, in 1972 there were 825,000 blacks in this highest category. In 1979, 7 years later, during a decade when there had been the strongest enforcement of the fair employment laws, there were 1,335,000 blacks in this category, a change of 500,000 jobs. If one includes families, that would affect over a million minorities.

In the craftworker category, an area where blacks had previously been limited in their opportunities, the data shows that 270,000 more blacks were working as craftworkers in 1979 than 1972. In critical crafts such as electricians, from which blacks had previously been excluded, the numbers of blacks from 1972 to 1979 has more than doubled, gone from 16,000 to 37,000. I might add that in these craft industries there has been an enormous amount of enforcement effort by the Federal Government and also by private lawsuits.

I also refer to former Secretary of Transportation Bill Coleman's comments——

The CHAIRMAN. Let me interrupt you a second. On these crafts, you are saying from 16,000 to 32,000. Those are the total number of jobs created for crafts? There have to be more than that.

Mr. GOLDSTEIN. No, that is true. From 1972 until 1979, the number of electricians in this country went from 490,000 to 640,000, which is an increase of approximately 20 percent. The number of blacks working in that electrician job——

The CHAIRMAN. You mean electricians?

Mr. GOLDSTEIN. In electricians, increased from 16,000 to 37,000, an increase of over 125 percent.

The CHAIRMAN. In other words, about a half of a percent, a little over a half of a percent only of the total electricians.

Mr. GOLDSTEIN. Well, actually in 1972 it was 3.3 percent; in 1979 it was 5.6 percent, I believe.

The CHAIRMAN. Yes.

Mr. GOLDSTEIN. Therefore, there was a 66 percent difference if you look at the percentage increase but if you look at the number of jobs, which I think is really critical, an enormous change from 16,000 to 37,000. One could also look at machinists' jobs which would show a similar increase. I picked electricians and machinists because traditionally blacks had been excluded from those crafts.

The CHAIRMAN. I missed it because I thought you were talking about all crafts.

Mr. **Goldstein**. No, in all crafts the number of black workers increased by 270,000, from 746,000 to over 1 million.

The **Chairman**. Do you attribute that to the 1964 act or do you attribute that to affirmative action or both?

Mr. **Goldstein**. I would attribute it to many things, and I think it would be very hard to parcel out the different factors. I attribute it to the 1964 act. I attribute it to affirmative action. There probably is no area in which affirmative action has been more applied than in the craft area, except maybe the police, which I will get to.

I think also because of the change in the law and the change in public opinion and Presidential leadership by Presidents of both parties, that there has been a change in the mood in the country. People understand that it is wrong to exclude people on the basis of race and sex. Certainly voluntary compliance has played a part but it would not have played an important part barring strong enforcement actions.

Let me turn to the police as my last example of an area where we can all take credit. Historically, blacks have been excluded from law enforcement in this country. This was a tragedy that was recognized in the mid-1960's by the crime commission report and by the study on civil disorders. There was the rare city in which more than 5 percent of the police officers were minority. This was attributed as a major factor for the unfortunate civil disturbances in the 1960's.

From 1970 to 1980 the number of black law enforcement officials, officers, increased from 23,000 to 43,000, a dramatic jump. In Detroit the number has gone from 5 percent in 1967 at the time of that tragic riot to about 35 to 40 percent. The number of black supervisors in the police department has increased even more dramatically.

Chief Hart, who is a well-known police chief—he was appointed by the Attorney General to the recent study on violent crime, he was one of the eight members of that study on violent crime that just issued its report in August—Chief Hart stated in testimony that since the affirmative action program began in 1974 there has been a reduction in the number of police officers killed in the line of duty from six to eight a year to none. From 1974 to the present, there has not been one police officer killed in the line of duty in the city of Detroit, whereas from 1967 to 1974 it had averaged about six per year.

There has been a reduction in crime, according to Chief Hart, due in part to affirmative action. There has been improved community-police relations, due in part, according to Chief Hart, to affirmative action.

It is not just Chief Hart. The Director of the FBI, Judge Webster gave a speech several years ago in which he said, "The lack of police officers in the FBI was a major handicap to the effective carrying out of the duties of the FBI."

It would be a serious and, I submit, unfortunate step for this country to retreat from the full and aggressive enforcement of its fair employment laws, fair employment laws that have brought very tangible results. I urge the committee to support the major principles of those laws which I have set out in my paper.

There is certainly room for improvement: For better definition and description of technical matters, such as the notion of availability of skilled minorities or women; the contours and type of affirmative action plans, how they can be made as fair as possible; the need for more coordination between Federal agencies; and, very importantly, more effective Government enforcement. However, the major principles are sound and should not, I submit, be changed.

Thank you.

The CHAIRMAN. Thank you, Mr. Goldstein.

May I just ask one question? You have given us an excellent historical analysis in your statement with the addenda attached, and I think a good analysis of why title 7 was passed, the Civil Rights Act. You make a good argument why we should continue to enforce title 7 and see it as the means for correcting a finding of discrimination. Do you have any other specific suggestions as to how we can improve employment opportunities for women and minorities?

Mr. GOLDSTEIN. Well, I think that the continued enforcement of title 7 in the ways that I have mentioned is critical but I also think that we do not want, nor could every plant be sued in this country. Only a small fraction of plants could be sued. There are only judicial resources to deal with the small fraction of the employment situations in the country.

What we need to do is to encourage voluntary compliance, and voluntary compliance through, one, supervision—and I will get to that in a second—and also to make voluntary compliance and realistic change possible—and I will get to that.

Supervision, the Executive order and other enforcement mechanisms, such as the oversight of Government grants—whether it was in LEAA or in revenue sharing funds—allows the Federal Government to review the practices of employers and local, State governments as to their equal employment opportunities without necessarily having a finding of discrimination. It also enforces employers and local and State governments to analyze their employment practices to determine if they need to change those practices because they are inhibiting the promotion or hiring of minorities or women. I think that is critical supervision.

The other thing is that you need to make voluntary efforts that will work available. By doing that one has to allow, as the Supreme Court did in the *Weber* decision, for voluntary affirmative action and give some discretion for companies like Kaiser Aluminum to deal with their internal problems as they see fit and to give some discretion to local and State governments like the city of Detroit to deal with their local problems as they see fit.

The CHAIRMAN. Well, thank you, Mr. Goldstein. We appreciate having your testimony and the lengthy analysis that you given to us.

Mr. GOLDSTEIN. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Goldstein follows:]

STATEMENT

of

Barry L. Goldstein, Assistant Counsel,
NAACP Legal Defense and Educational Fund, Inc.,
In Re the Enforcement of the
Fair Employment Laws and Policies

Before

The Senate Labor and Human Resources
Committee, Washington, D.C.,
December 8, 1981

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify on this important matter. My name is Barry L. Goldstein, and I am an assistant counsel to the NAACP Legal Defense and Educational Fund, Inc. in the Washington, D.C. office. During the more than 10 years that I have been on LDF's staff I have worked on LDF's fair employment project.[1]

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[1] In the last 10 years the Legal Defense Fund in conjunction with cooperating attorneys in private practice around the country has litigated hundreds of fair employment cases. Legal Defense Fund lawyers have been in the forefront of the effort to realize the goals of the fair employment laws. For example, LDF lawyers have been counsel in the following cases in the Supreme Court, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 549 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Albemarle Paper Company* v. *Moody*, 422 U.S. 405 (1975); *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976); *Brown* v. *General Services Administration*, 425 U.S. 280 (1976); *IUE* v. *Robbins & Myers*, 429 U.S. 229 (1976); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Carson* v. *American Brands, Inc.*, 49 U.S.L.W. 4171 (1981); *Gulf Oil Co.* v. *Bernard*, 49 U.S.L.W. 4604 (1981).

The Legal Defense Fund's substantial efforts in enforcing the fair employment laws are part and parcel of the Fund's efforts over more than 40 years to establish and enforce equal rights for black

The issue that the Committee is considering today is of fundamental importance -- what is the best method for insuring equal employment opportunity. Perhaps one measure of the importance of this issue is the number of government reports, hearings and analyses which have been written, held and prepared regarding the problem of employment discrimination. These reports have been prepared by presidential commissions or committees,[2/] Comptroller

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(Footnote continued)
citizens in all areas of American life. See e.g., *Brown* v. *Board of Education*, 347 U.S. 438 (1954); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

The Legal Defense Fund has been cited by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP* v. *Button*, 371 U.S. 415, 422 (1963); *see Bernard* v. *Gulf Oil Co.*, 619 F.2d 459, 470 (5th Cir. *en banc* 1980), aff'd, 49 U.S.L.W. 4604 (1981).

[2/] See e.g., *Final Report of the Fair Employment Practice Committee*, (GPO: 1947); *To Secure These Rights*, *The Report of the President's Committee on Civil Rights* (Simon and Schuster; New York, 1947); President's Committee on Government Contracts, *First Report* (Wash., D.C. 1954); Committee on Government Contracts, *Patterns for Progress, Final Report to President Eisenhower* (Wash., D.C. 1959).

The Civil Rights Commission has prepared a series of comprehensive reports on the practices of discrimination and the enforcement effort. See e.g., *1961 Report: Employment* (1961); *Federal Civil Rights Enforcement Effort* (1971); *The Federal Civil Rights Enforcement Effort: One Year Later* (1971); *The Federal Civil Rights Enforcement Effort-A Reassessment* (1973); *The Federal Civil Rights Enforcement Effort-1977-To Eliminate Employment Discrimination: A Sequel* (1977).

Furthermore, presidential commissions regarding law enforcement, see e.g., *The President's Commission on Law Enforcement and Administration of Justice* (1967), and on civil disorders, see e.g., *Report of the National Advisory Commission on Civil Disorders* (Bantam Books: New York, 1968), have discussed the social problems and disorder caused by general employment discrimination and in particular by discrimination within law enforcement agencies.

General of the United States,[3] the Congress,[4] and administrative agencies.[5]

I mention this accumulation of government reports and hearings not to suggest that additional reports and hearings are not necessary. They are necessary. The problem of discrimination in employment remains. We can well understand that the problem remains when we consider that the employment system in this country was in substantial part based upon slavery for over a hundred years and upon overt, systematic discrimination for over two hundred years, while the clear commitment to equal employment opportunity is but 20 years old. The Chairman of the Board of the Legal Defense Fund, Mr. Coleman, in recent Senate testimony has described this "malevolent" tradition which sanctioned racial segregation and racial discrimination. See Appendix A to this Testimony.

Before we address what to do in 1981 about finally ridding this society of the effects of its "malevolent" tradition, we need to understand the patterns and mechanisms of discrimination, and we need to understand the history and lessons of four decades of attempts to end that discrimination. If we fail to proceed carefully with due consideration to the enormity of the problem and the substantial efforts which have been undertaken, then we risk tragedy and needless prolongation of the "malevolent" tradition of racial discrimination.

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[3] See e.g., The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination (1976); Problems with Federal Equal Employment Opportunity Guidelines on Employee Selection Procedures Need to be Recorded (1976).

[4] See nn. 8, 11. infra.

[5] The Equal Employment Opportunity Commission has now published thirteen annual reports. The Office of Federal Contract Compliance and the Office of Management and Budget have also prepared analyses of enforcement efforts.

In a thorough review of affirmative action by Mr. Coleman and in a historical review of the Executive Order program which I prepared we have attempted to provide a perspective for present policy-making. Both these analyses are attached to this statement.6/ In this presentation I would like to outline the nature of the problem of discrimination, the attempts to resolve this problem, and results of these attempts, and then to discuss the direction that fair employment efforts should take.

The Pattern of Discrimination. It should be obvious that one should examine the problem before pronouncing the solution. However, in the debate regarding the appropriate process for ending employment discrimination or regarding the appropriateness of affirmative action one often hears comments or proposals which ignore the problem. While philosophical questions regarding affirmative action or legal questions regarding an "effect" or "intent" standard are certainly relevant, any discussion of a remedy for employment discrimination must consider the problem. The approach for remedying employment discrimination must, as the Supreme Court stated, be aimed at ending an "ignominious page in this country's history." Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

_/ Statement of William T. Coleman, Jr., In Re Affirmative Action to End the Effects of Racial Discrimination and Segregation before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, Washington, D.C., June 11, 1981, attached as Appendix A; The Importance of the Contract Compliance Program: Historical Perspective, prepared by Barry L. Goldstein (May 1981), attached as Appendix B.

If discrimination in the market place primarily concerns overtly discriminatory actions by, for example, a bigoted foreman or personnel director, then one approach would be indicated. It would be sufficient to use an enforcement mechanism triggered by a finding of intentional discrimination and directed towards remedying individual victims.

If discrimination in the market place primarily concerns obstacles to equal employment opportunity resulting from systemic practices which developed in or resulted from the history of racial discrimination then a different approach would be indicated. It would be necessary to use an enforcement mechanism triggered by practices which disadvantage minorities and which are without adequate business justification. Moreover, we would require that the remedy be directed towards taking affirmative action towards ending the effects of these practices upon minorities.

In its Final Report issued in 1959 the Committee appointed by President Eisenhower to supervise the enforcement of the contract compliance program recognized that the problem of discrimination was systemic and that "positive" action was required. "Overt discrimination is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of quality."[7/] As a result of this recommendation the requirement of affirmative action

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[7/] Committee on Government Contracts, Pattern for Progress, Final Report to President Eisenhower (Washington, D.C. 1959/1960), p. 14.

was added to the contract compliance program in 1961. See Appendix B, pp. 26-28.

The purpose of Congress in enacting Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). The experience gained in enforcing Title VII of the Civil Rights Act of 1964 clearly verified the Eisenhower Committee's conclusions regarding the systemic nature of the problem, the need for positive actions and the appropriateness of a law aimed at eliminating those "practices and devices" which continued employment discrimination. In reviewing the experience of the first seven years of enforcement of Title VII, the Senate Committee on Labor and Public Welfare emphasized the systemic nature of the problem of discrimination.

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices throught various institutional devices, and testing and validation

> requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (Emphasis added; footnote omitted).[8]

Furthermore, "Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order 11,246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action." University of California v. Bakke, 438 U.S. 265, 353 n. 28 (1978). See Appendix B, pp. 43-48.

The history of the enforcement of Title VII as well as the general history of blacks in the workplace[9] demonstrates, as Congress has previously found, that racial discrimination was firmly established in industry, unions[10] and in government.[11] This entrenched problem -- the centuries of systematic racial discrimination -- requires, as Congress recognized, strong solutions.

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[8] S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971); compare H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legislative History of Titles [illegible] and XI of Civil Rights Act of 1964 at 2018.

[9] See generally, S. Spero and A. Harris, The Black Worker (1931) (Atheneum ed. 1974). See also G. Myrdal, An American Dilemma at 1079-1124 (1944) (Harper & Row ed. 1962). A thorough discussion of black workers during the period from World War I through World War II is found in R. Weaver, Negro Labor, A National Problem (1946), and of blacks in labor unions in R. Marshall, The Negro and Organized Labor (1965); R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); and H. Northrup, Organized Labor and the Negro (1944). For more recent discussions, see H. Hill, Black Labor and the American Legal Ssytem: Race, Work and the Law (1977), and W. Gould, Black Workers in White Unions (1977).

[10] "Judicial findings of exclusions from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. United Steelworkers of America v. Weber, 443 U.S. 193, 198 n. 1 (1979).

[11] The congressional reports preceding the 1972 amendment to Title VII documented the history of discrimination by the federal government and by state and local governments. S. Rep. No. 92-415, 92d Cong., 1st Sess. 10-17 (1971); H.R. Rep. No. 92-238, 92d Cong. 1st Sess. 17-19, 22-26 (1971).

The Approaches towards Equal Employment Opportunity. The Supreme Court has identified four general principles in the congressional scheme for enforcing the public policy of equal employment opportunity:

> 1. "... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Title VII of the Civil Rights Act of 1964 "prescribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id. at 431.[12/]
>
> 2. "...[L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.... [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." (Footnotes omitted), Alexander v. Gardner-Denver Company, 415 U.S. 36, 47-48 (1974).
>
> 3. In determining an appropriate remedy the Supreme Court has instructed courts to consider the two major objectives of Title VII: "'to eliminate so far as possible the last vestiges of an unfortunate and ignominious page [employment discrimination] in this country's history'" and "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); see also Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976).[13/]

[12/] Both the Senate and House Reports preceding the amendment of Title VII specifically approved the Griggs decision. S. Rep. No. 92-415, 92d Cong., 1st Sess. 4, 14-15 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 8, 21 (1971).

[13/] All nine of the federal courts of appeals that have considered the legality of race-conscious remedies in employment discrimination have found them lawful when necessary to correct proven and alleged violations of the law. See Appendix, pp. 4-5, n.5

> 4. A voluntary race-conscious affirmative action plan does not violate Title VII if the plan was "designed to break down old patterns of racial segregation and hierarchy[,] ....does not unnecessarily trammel the interests of the white employees [and] .... is a temporary measure..not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." United Steelworkers of America v. Weber, 443 U.S. at 208.

The continued maintenance of these four general principles is essential to the attainment of the important public policy of equal employment opportunity. Before discussing the methods for implementing these principles, I would like to turn to the substantial changes which have occurred in the job market since the decision in Griggs. We often have heard cited the figures showing the high level of minority unemployment and the continuing gap between the earnings of white and black citizens. These figures reflect serious problems and require study and action. However, let me focus on what often remains unstated: the progress that has been made towards breaking down job barriers.

Anyone who is familiar with American industry recognizes that a substantial change has occurred. Where black workers had previously been limited to "hot, dirty, or otherwise disagreeable jobs," in our factories, Marshall and Briggs, supra, p. 34, they are now moving up the job ladder into higher-paying jobs, craft positions and supervisory positions as the following chart indicates:

Distribution of Employed Persons By Sex Race, and Occupation: 1972 and 1979[14]

	1972		1979	
	Total employed (1,000)	Percent Black and other[15]	Total employed (1,000)	Percent black and other
Total	81,702	10.6	96,945	11.3
Professional, Technical and kindred workers	11,459	7.2	15,050	8.9
Managers and administrators, except farm	8,031	4.0	10,516	5.4
Sales workers	5,354	3.6	6,163	4.9
Clerical and kindred workers	14,247	8.7	17,613	11.0
Craft and kindred workers	10,810	6.9	12,880	7.9
Operatives, except transport	10,340	13.2	10,909	15.1
Transport equipment operators	3,209	14.8	3,612	14.5
Laborers, except farm	4,217	20.2	4,665	17.4
Farmers and farm managers	1,688	3.3	1,446	2.6
Farm laborers and supervisors	1,381	15.1	1,257	16.3
Service workers, except private household	9,529	18.5	11,746	18.5
Private household workers	1,437	40.6	1,088	33.1

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[14] Statistical Abstract of the United States, 1980, Table 697

[15] "Other than whites": It should be noted that in the text this category is referred to as "blacks." Blacks comprise the large majority of persons listed in this category.

While there is a substantial disparity between the proportion of blacks in the workforce, 11.3%, and their proportion in certain job categories, the progress during the 1970's has involved hundreds of thousands of jobs. For example, in 1972 there were approximately 825,000 blacks in the professional, technical and kindred workers category, whereas in 1979 there were approximately 1,335,000 blacks or an increase of over 500,000 jobs. In 1972 in the craft and kindred worker category there were approximately 746,000 blacks, whereas in 1972 there were approximately 1,018,000 blacks or an increase of over 270,000 jobs.16/

While these figures must be treated with caution, they do reflect substantial changes in the job market. These changes in the job market are of critical importance to everyone. In its Final Report in 1946 the wartime Fair Employment Practices Committee (FEPR) stressed the need for congressional action to establish a permanent fair employment law because the "denial of equal opportunity, if allowed to become permanent, cannot fail to create civic discord and to be a cause of embarrassment to the United States in its international relations." *Final Report*, p. VIII. Unfortunately, the FEPC went unheeded, racial discrimination continued, and tragically the results were correctly predicted--"civic discord" and "embarrassment to the United States in its international relations."

16/ Of particular importance is the increase of blacks in the crafts from which they have been traditionally excluded and which are crafts with expanding job opportunities such as the electricians. In 1972 blacks comprised 3.2% or 15,872 of the 496,000 electricians in the country, whereas in 1972 blacks comprised 5.6% or 35,840 of the 640,000 electricians in the country. The number of black electricians has more than doubled in these seven years.

However, fortunately the country responded to the request of the FEPC in the 1960s and the progress made in the last twenty years under the civil rights laws not only has made the United States a more just society and truer to its stated ideals but has contributed in a practical way to the domestic and international[17/] well-being of the country. It would be a serious and, I submit, unfortunate step for this country to retreat from the full and aggressive enforcement of its civil rights laws.

Perhaps in no area of employment has the progress towards fair employment opportunity been as important as in law enforcement agencies.

The President's Commission on Law Enforcement and Administration of Justice thoroughly reviewed the problem of law enforcement in major cities and especially the relationship between the police and minority groups, Task Force Report: The Police (GPO 1967). The Commission determined that there was a critical shortage of

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[17/] Secretary of State Dean Acheson eloquently explained the international problems created by the practices of racial discrimination: ".....[T]he existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.

"I think it is quite obvious . . . that the existence of discriminations against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased

(footnote continued)

black police officers in most large cities, that discrimination in the selection of blacks was widespread, and "that discrimination is practiced against minority group officers, perhaps more in promotion than in recruitment." Id., P. 172. Moreover, the problem of hostile relations between the police and minority communities, in the Commission's view, "is as serious as any problem the police has today," The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (GPO 1967) P. 99.

The practices of discrimination by police departments, the gross underrepresentation of blacks in police departments, and the antagonism between police and the black community are interrelated. "In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole." Task Force Report: The Police, supra, 167. "[M]ore Negro police officers, particularly as superior officers, are needed to gain the confidence of the Negro community;" Id., P. 206. Report of the National Advisory Commission on Civil Disorders supra, 315-16.[18]

(footnote continued)
effectiveness of public and private efforts to do away with these discriminations." Letter sent to the FEPC on May 8, 1946, quoted in To Secure These Rights The Report of the President's Committee on Civil Rights (Simon and Schuster; New York, 1947)

[18] Patrick V. Murphy, a former head of the police departments in Detroit Washington, D.C. and New York City stated in his testimony before the Commission on Civil Disorders as follows: "I think one of the serious problems facing the police in the Nation today is the lack of adequate representation of Negroes in police departments. I think the police have not recruited enough Negroes in the past and are not recruiting enough of them today. I think we would be less than honest if we didn't admit that Negroes have been kept out of police departments in the past for reasons of race discrimination." Report of the National Advisory Commission on Civil Disorders, 316.

As a result of an intensive litigation efforts (the Department of Justice alone has over 40 pending cases against law enforcement agencies), voluntary changes, and affirmative action there has been a substantial increase in the number of black law enforcement officers. In 1970, 6.34% or 23,796 of the 375,494 policemen and detectives in the country were black,[19] whereas in 1979 approximately 9%[20], or 43,560 of 484,000, were black. In the last decade over 20,000 black officers have been added to law enforcement agencies.

(footnote continued)

Speaking before the National Association of Black law Enforcement Executives in June 1978, FBI Director William H. Webster stated:

> We have suffered in the past from a lack of minority candidates for the Special Agent position. Although 16% of our total employees are minority members, there are still not nearly enough Special Agents to be truly representative and to enable us fully to perform our designated tasks.
>
> When I came on board I recognized that this inadequacy of numbers (there were only 144 Black Special Agents out of nearly 8,000) represented a real problem to us.

Remarks by William H. Webster, Director, Federal Bureau of Investigation, before the National Organization of Black Law Enforcement Executives, St. Louis, Missouri, June 23, 1978, at 7.

19/ U.S. Bureau of the Census, *Census of the Population: 1970, Vol. 1, Characteristics of the Population, Part 1, United States Summary - Section 1*, Table 223 (1973).

20/ *Statistical Abstract of the United States 1980*, *supra*. The information for the most recent year groups "blacks and others." Since "others" comprise about 10% of this category the figure 9.9% was reduced by 10% in order to make the figure comparable to the 1970 census data.

The Chief of Police for the City of Detroit, William L. Hart,[21/] testified in a lawsuit brought by several white officers challenging the voluntary affirmative plan which had been adopted by the Detroit Police Department. Baker v. City of Detroit, 483 F.Supp. 930 (E.D. MI, 1979). Chief Hart, as described by the district court, vigorously defended the affirmative action plan which had greatly increased the number of black police officers in the department.

> Chief Hart and Deputy Chief Bannon testified that the affirmative action plan dramatically reduced citizens' complaints filed against the Department. Chief Hart testified that the plan resulted in a reduction of the number of officers killed in the line of duty of from 6 to 8 each year to zero. Chief Hart testified at trial that no police officer has been killed in the line of duty since 1974, when the affirmative action plan was instituted. Chief Hart also testified that crime was reduced significantly because of police-citizen cooperation fostered by the affirmative action program. Id., pp. 999-1,000.

The experience of the Detroit Police Department illustrates Bill Coleman's statement that affirmative action which brings minorities into predominantly white schools, offices, factories, and neighborhoods and governmental jobs can also have a "beneficial" effect on the white majority Appendix A, pp. 18-20.

In the appendices to this statement we have set out in some detail the justification for two important parts of the equal employment opportunity effort, affirmative action and the contract

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[21/] Chief Hart was one of the eight persons selected by the Honorable William French Smith to be a member of the Attorney General's Task Force on Violent Crime, which issued its Final Report on August 17, 1981.

compliance program. The other major and essential enforcement mechanism is litigation. The filing of lawsuits has been a major impetus for change. While this is not the time to review the history of equal employment litigation, it is fair to say that entire industries have made substantial efforts to integrate employment opportunity as a result of litigation[22/] and the "spur and catalyst" of potential back pay liability. Moreover, litigation, as in Griggs and Albemarle Paper Co., has helped set the standard and guidelines for the many companies and governmental employees who have chosen to work voluntarily towards equal employment opportunity.

The federal government, both the EEOC and the Justice Department, have an important role to play in bringing enforcement litigation. However, the federal government has yet "to demonstrate a capacity to be as effective as their potential." Belton supra,

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[22/] In the trucking industry black workers have been hired and moved into the previously predominantly white over-the-road driver position, see e.g., Franks v. Bowman Transportation Co., supra; in the steel industry blacks have been moved into the higher-paying production, craft and supervisory positions, see e.g., United States v. Allegheny-Ludlum Industries, 517 F.2d 826 (5th Cir. 1975), cert. den., 425 U.S. 944 (1976); in the paper industry blacks have moved from the wood yard to the craft and higher-paying production jobs, see e.g. Albemarle Paper Co. v. Moody; in the railroad industry blacks have moved from switchmen to conducter and other supervisory positions, see e.g., Gamble v. Birmingham Southern R.R., 514 F.2d 678 (5th Cir. 1975). The list of industries affected and the opportunities which have been opened as a result of litigation extend to many if not most of the major industries in the United States. See Belton, A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964, 31 Vand. L. Rev. 905 (1978); Belton, Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments, 20 St. Louis U.L.J. 225 (1976).

31 Vand. L. Rev. at 961.[23] For example, as the Acting Chairman of the EEOC recently stated in testimony before the Subcommittee on Employment Opportunities, Committee on Education and Labor, (October 7, 1981, p. 15), the systemic enforcement program at the Commission is only now in a position possibly to institute lawsuits. Class action lawsuits involving systemic issues of discrimination have been brought successfully by the private bar for many years. However, the EEOC has made substantial efforts to clear its administrative backlog, reorganize its procedures, and develop an effective enforcement program. It should not be thwarted now by a lack of either budgetary or policy support for its program.

At present the major enforcement mechanism is private litigation. In the twelve month period ending June 30, 1981 there were 6,245 employment discrimination suits filed in the federal courts. Annual Report of the Director of the Administrative Office of the United Courts (Wash. D.C. 1981). Of those 6,245 cases not more than 225 cases were filed by the federal government.[24] The right of individuals to file employment discrimination cases must be fully supported and maintained if there is to be effective enforcement litigation.

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[23] This is not to disparage the substantial litigation achievements by the federal government. See, e.g., the discussion above regarding the Justice Department's efforts to end employment discrimination in police departments.

[24] This estimate is based upon the Acting Chairman's "Year-End (FY '81) Report on EEOC Activities," (October 8, 1981), which indicates that under Title VII 195 cases were approved by the Commission for filing in FY '80 and 199 for filing in FY '81, the November 1980 docket of employment cases of the Justice Department, and a discussion with a supervisor in the Civil Rights Division.

Conclusion: While there is still a long way to go, there has been substantial progress towards the goal of equal employment opportunity. The enforcement program certainly can be improved, but its main supports--affirmative action, contract compliance, federal government and private litigation-- must be retained and strengthened. The program may be improved by several undramatic but nevertheless difficult steps. For example: (1) the development and implementation of an effective systemic litigation program by the EEOC; (2) the development of an effective targeting system and the sharing of information by the EEOC and OFCCP; (3) refinement of the technique for determining the availability of minorities and women for employment; and (4) effective support of fair and reasonable affirmative action plans.[25]

Again, I would like to thank the Chairman and the Committee for providing this opportunity to testify.

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[25] We note that advances have in the recent past been made along these lines. For example, we understand that the Civil Rights Commission is about to publish as a final report a guide to and explanation of affirmative action. If it is similar to its earlier preliminary report we think that the Commission's efforts are constructive and needed. Also it should be mentioned that State Advisory Committees have made constructive efforts to explain affirmative action. See e.g., Affirmative Action in Salt Lake's Criminal Justice Agencies, prepared by the Utah Advisory Committee (1978).

The OFCCP has been studying the problem of defining availability for several years. It contracted for and received an extensive report prepared by ABT Associates, Inc., Restructuring Availability Analysis for Affirmative Action Planning (1981).

Finally, the EEOC and the OFCCP have for the last several years been working towards developing an efficient cooperative relationship.

We support these efforts and hope that with adequate budgetary and policy support they will lead to a more effective enforcement program.

(Note: In the interest of economy, the appendixes to Mr. Goldstein's statement were retained in the files of the committee where the material may be researched upon request.)

The **Chairman**. Our second witness today will be Mr. Ronald M. Green, senior partner of Epstein, Becker, Borsody & Green, from Washington, D.C.

Mr. Green, we are happy to welcome you to the committee. I did not explain the lights; that is why I let Mr. Goldstein go a little bit longer. The green light means "go." The yellow light means you have 1 minute. If we can stay within that 10-minute time limit, I would appreciate it. It is a matter of necessity for me today. Go ahead.

STATEMENT OF RONALD M. GREEN, SENIOR PARTNER, EPSTEIN, BECKER BORSODY & GREEN, WASHINGTON, D.C.

Mr. **Green**. Thank you, Mr. Chairman. Good morning. May I say how much I appreciate this opportunity to testify about an equal employment law enforcement program, worthy in purpose and design, which has become—in my view and in the view of many—woefully misdirected.

I listened with great interest to the previous witness, Mr. Goldstein, and his brief allusion to the historical perspective in the context of Executive Order 11246, and I think it is instructive for all of us to take the time to see what this program once was, what it has become, and how it got there.

In 1959, then-Vice President Richard Nixon coined a phrase. It had not before been used in the Presidential Executive order contract compliance program during its history, which dated back to 1941. He called that phrase "affirmative action." As Presidential Equal Opportunity Committee Chairman, that Committee then being given the task of implementing the Executive order program, Vice President Nixon said that what we needed was something beyond passive nondiscrimination. He said we had to have a reaching out and a counseling and upgrading and training effort but one would search in vain, as I have, for any allusion to the use of goals or quotas or timetables, or color- or race- or sex-conscious decisionmaking within the confines of the report which Vice President Nixon authored.

As matter of fact, the Executive order which we are here to talk about today speaks to affirmative action in only one place, and that is in the very first paragraph of the multiparagraph equal opportunity clause which it requires be included in nonexempt Government contracts and subcontracts. It is substantially the same clause that President Kennedy wrote in 1961; its genesis is the equal opportunity clause which President Roosevelt wrote in 1941.

Its use of affirmative action is carefully circumscribed. It says that affirmative action is to be required only for the purpose of avoiding the use of race- or sex- or color-conscious decisionmaking in the employment process by Government contractors and subcontractors.

The **Chairman**. That would be consistent with title 7, is what you are saying.

Mr. **Green**. Indeed it would. However, that clause was written many years before title 7. It is in fact the forerunner of the nondiscrimination clause which appears in the text of title 7 itself. As you know, title 7 also uses the term "affirmative action" but only in the context of a remedy which a court can fashion after a finding of discrimination.

It is not without reason that contractors and others consider the affirmative action term the most controversial of all that appear in the OFCCP's program regulations, and that is because somehow the nexus was broken between the Executive order and what it purports to require by Presidential mandate, and the regulations which have been issued through the years by various Secretaries of Labor and their own appointees as Directors of the OFCCP. As a matter of fact, one of the reasons contractors are so terribly concerned about this affirmative action mandate is because of something that happened in the Congress in 1971, prior to the 1972 amendments to title 7, which included section 718, a limitation on OFCCP's authority to harass contractors with multifacility establishments by repeated and vexacious compliance reviews.

There was at that time an effort made to merge the OFCCP with the EEOC. Some wanted to abolish the OFCCP and the reason was as stated by the previous witness, Mr. Goldstein: There was none then, there is no way now, of measuring the number of placements effected for minorities and women under the contract compliance program.

Therefore, how is the OFCCP to justify its budget and its reason for existence? It converted in 1971 to a different type of program, not to a prospective partnership between Government and industry calling for the voluntary establishment of goals, truly goals, benchmarks or yardsticks to measure progress, to gage results, keyed to the good faith efforts at the implementation of these numerical objectives. It converted from that instead to a retrospectively oriented program designed to punish for past misdeeds, to link the eligibility for future Government contracts not upon promises of future performance and gages of future progress but upon misdeeds, upon correcting for no limited period of time, wrongs which the OFCCP perceived, to restore to their rightful place people that for whatever reason—for reasons perhaps unrelated to a contractor's own employment practices—were not where in the OFCCP's opinion they ought to be.

More than that, they require now an analysis of something called affected classes, nothing more than a requirement that a Government contractor admit that it has in its employment victims of prior discrimination, admitting so by their job location, their job description, their job title, and their rate of pay, in documents which with increasing frequency courts find admissible and of probative value in title 7 litigation.

Therefore, the price of securing a Government contract opportunity has become to admit to prior discrimination, even if actionable under other Federal statutes. Once having done so, that document may very well find its way into a court and into a pending or thereafter to be commenced title 7 or similar enforcement proceeding.

The OFCCP accomplishes this nonetheless with an incredible amount of make-work paperwork requirements: Affirmative action plans for every establishment of multifacility establishments regardless of size, with 16 factors of analysis, requiring oftentimes the retention of expensive outside consultants to develop, for every job group a goal and a timetable.

Moreover, that goal has not retained its original purpose as a measuring yardstick. It is no longer simply a gage of progress; it is in all too many circumstances a de facto quota. The contractor maintains the equivalent of a burden of proof to determine why, despite his or her best efforts, this goal qua quota was not met. For some contractors, especially the smaller ones, the failure to reach that goal and satisfy the OFCCP—which is investigator, prosecutor, and judge in the administrative proceedings they commence—is a death sentence.

I will be happy to answer any questions you may have, Mr. Chairman.

The **Chairman**. Well, I think what you are indicating is that under present law the OFCCP is judge, prosecutor, and jury, and that once they bring a case against many of the small businesses, the small business people either have to capitulate or give up their businesses because they cannot afford to continue to defend themselves when they are presumed to be guilty to begin with. Am I wrong in that assumption from what you have said?

Mr. **Green**. You are quite right. Since 1941, in all but two administrative proceedings commenced by the OFCCP against Government contractors—to no one's real surprise—the OFCCP has won. The investigative record is compiled by OFCCP, the Department of Labor, and Employment Standards Administration personnel. The attorneys representing them are Department of Labor personnel. The judge that hears the case and makes the recommended findings is a Department of Labor employee. The final decision is made by the Secretary of Labor and communicated to the Comptroller General to effect contract cancellation and debarment, and that concludes the administrative process.

The **Chairman**. That might cause any small businessman or even a large businessman to worry considerably about whether or not he is going to have fair treatment during all of that process.

Mr. **Green**. That no doubt accounts for the paucity of administrative proceedings that the OFCCP has had to commence since 1941.

The **Chairman**. In your testimony you suggest eliminating OFCCP's ability to obtain penalties for past conduct. Is there legal authority for taking such a step?

Mr. **Green**. Not only would there be authority for taking such a step, I think the authority which the OFCCP has asserted for pursuing back pay is sufficiently dubious. There is no mention of back pay in the current Executive order; there is no mention of monetary relief of any kind in any Executive order dating back to 1941. The program was not historically complaint-oriented and, as former Solicitor of Labor and Under Secretary of Labor Lawrence Silverman testified several years ago, the OFCCP traditionally has prided itself on the fact that it need not prove discrimination to effect relief for those it perceives as the victims of discrimination.

The **Chairman**. Well, if you do not prove discrimination, then what justification is there for coming down hard on any businessman, let alone small businessmen in our society—businessmen and women, I guess we should say.

Mr. **Green**. In my view, Mr. Chairman, there is no justification and there is no authority in law for the OFCCP to pursue remedial relief, monetary or otherwise, for those it has alleged but has not proven are the victims of actionable employment discrimination by the employer in question.

The **Chairman**. I take it you are saying that actionable employment discrimination really ought to be sought out and stamped out?

Mr. **Green**. Yes, indeed, but not by the OFCCP.

The **Chairman**. You are saying that title 7 ought to be enforced, that nobody's civil rights should be violated, and there should be no discrimination against anybody in our society. Am I right in interpreting that?

Mr. **Green**. You are quite right. Indeed, the Executive order itself back in 1965 included a provision calling for a partnership between the EEOC, the Department of Justice, and the OFCCP. It includes that provision today. There have been several memoranda of agreement, one still in effect, between EEOC and OFCCP for the express purpose of the OFCCP passing on to that agency files on employers it believes ought to be further queried, and against whom enforcement action through U.S. district courts ought to be commenced.

The **Chairman**. However, what you are saying, it seems to me, is that unless there is a finding of discrimination there is really no reason at all to have the OFCCP bringing action against business people in our society, and certainly small business people in our society where it could actually break them, based upon a system of quotas.

Mr. **Green**. That is my point exactly.

The **Chairman**. All right. If OFCCP is barred from seeking back pay, will individual victims of discrimination or classes of such persons be left without recourse? Are there individuals now whose only recourse is relief from the OFCCP?

Mr. **Green**. To my knowledge there is no employer covered by Executive Order 11246, and against whom claims of discrimination can be asserted, that would not also have an obligation, legally enforceable, to avoid discrimination in the workplace under section 1981 of title 42 of the U.S. Code and title 7 of the 1964 Civil Rights Act.

The **Chairman**. Well, there are those who contend that the Executive order requires more affirmative action efforts besides such things as outreach, recruitment, and training. They suggest that preferential treatment should be given to women and minorities until you overcome the effects of past discrimination.

Since you were at the Labor Department during the period goals and timetables were started, could you give us your professional judgment on this argument? Does the order require preferential treatment? Does it require "protected classes"?

Mr. **Green**. Not only does the order not use the terms "preferential treatment," "protected class," "minority," or "female," but in the only place it uses the term "affirmative action," it mandates its use for all people regardless of, by accident of birth, their occupationally irrelevant characteristics such as their race and their sex.

The CHAIRMAN. That is consistent with the Civil Rights Act of 1964 as amended?

Mr. GREEN. There is more than a passing similarity between the verbage of title 7 and the language upon which it is based, paragraph 1 of the equal opportunity clause in Executive Order 11246.

The CHAIRMAN. Both your testimony and the statements of others have indicated that the easiest way for a contractor to comply with existing requirements is to acquiesce to all agency demands, all OFCCP demands, even if the contractor knows that it cannot fulfill all of its promises. Now is that correct?

Mr. GREEN. A contractor, particularly one of limited resources, simply has no alternative. The price of combat is prohibitive.

The CHAIRMAN. You are saying combat with the agencies of Government that are supposedly set up to aid and assist all people in society on an equal basis.

Mr. GREEN. That is precisely correct.

The CHAIRMAN. Well, is this sort of professional hypocracy, as some have called it, endemic to such a program or can the OFCCP be reshaped to encourage contractor and Government cooperation and honesty, or do we have to continue to have the complaints made to our committee and to the Labor Department, and in the courts of this country after administrative review, that business is being discriminated against through a system of really goals, timetabes, and quotas.

Mr. GREEN. I think it would be a terrible waste if we threw the baby out with the bath. The OFCCP had an important job to do, which is still undone. There is a major role for it to play, to assist contractors, to help them determine courses of action in the area of affirmative action, to work with them in training, even assist in the development of goals and timetables for which good faith efforts may be directed to gage progress and determine the needed areas of concern.

That is not to say that the OFCCP should pursue its course of demanding quotas; of having hearings which it controls, effectively denying due process; of badgering and harrassing especially small- and medium-size businesses; of creating work that serves no purpose.

The CHAIRMAN. Well, we have had lots of testimony here from various businesses that they have gone through years of OFCCP review at the cost of hundreds of thousands of dollars, with no findings of discrimination and no findings of really failure to comply with voluntary affirmative action programs. Has that been your experience as well, even though we know that there are businesses that do discriminate and that are not doing their best to try to employ women and minorities in our society?

Mr. GREEN. Section 718 of title 7 was added in the closing hours of debate during the 1972 amendments to the Equal Opportunity Act. It deals with Executive Order 11246 and precisely the concerns you have just expressed. It prohibits the second and third and fourth compliance review at the same facility during a given year for the purpose of exacting more from a contractor that has already established an acceptable affirmative action program.

The CHAIRMAN. If it prohibits it, then why are they doing it?

Mr. GREEN. I do not know.

The **Chairman**. We are having lots of complaints that—you mean, you are saying they are violating present law, the OFCCP itself?

Mr. **Green**. They are violating the spirit of section 718, if not the letter, and they are certainly violating the spirit of their own operational manual.

The **Chairman**. Do you think that really this type of activity by OFCCP really leads to better attitudes toward hiring women and minorities and, in fact, does it lead to better processes of hiring women and minorities?

Mr. **Green**. In its present direction, the OFCCP works at cross purposes to the voluntary and often substantial efforts of private industry in moving minorities and women into industry and up.

The **Chairman**. Well, as I understand your testimony—and this will be the last question I will ask of you, and you have been very succinct in trying to bring to the committee's attention your particular point of view and your experience—If I understand you correctly, you are saying that you do not think that the OFCCP should be done away with but you think it ought to live within the law itself, and be less harassing and be more concerned about voluntary compliance, if I am interpreting you correctly, and in the process would probably get more women and minorities actually hired.

Mr. **Green**. Yes, Mr. Chairman.

I would say one thing further: Recent case law makes it clear that affirmative action plans can play a very useful role in defending, not just so-called reverse discrimination lawsuits but conventional discrimination lawsuits under title 7. I think it is fair to say that industry recognizes that affirmative action is worth pursuing and affirmative action plans are worth having. OFCCP should rejoin that partnership because it is in their best interest and the best interests of American industry to see that affirmative action works.

The **Chairman**. That you, Mr. Green. We appreciate your efforts.

Mr. **Green**. Thank you, Mr. Chairman.

[The prepared statement of Mr. Green follows:]

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TESTIMONY OF

RONALD M. GREEN

PARTNER

EPSTEIN BECKER BORSODY & GREEN, P.C.

(December 8, 1981)

Chairman Hatch and Members of the Committee:

I wish to thank you for this opportunity to express my views on the status of the Federal Government's equal employment and affirmative action law enforcement programs and policies, and particularly the President Executive Order Contract Compliance Program.

I am Ronald M. Green, a management labor attorney, and I have been engaged in the prosecution or defense of equal employment litigation for approximately thirteen years. Roughly the first half of my legal career was spent as legal counsel to the United States Department of Labor's Office of Federal Contract Compliance where I was directly involved in the early days of that Agency's venture into the then unchartered waters of affirmative action. For the past seven years I have been representing employers (large and small) in coping with the full array of Federal EEO executive orders and statutes. I intend to confine my brief remarks to the OFCCP and the Contract Compliance Programs, but I would be happy to answer any questions of a broader nature which you may have.

I. Introduction: An Overview

It no longer remains seriously questioned that the President, within constitutional and statutory limitations, may pursue the achievement of certain socio-economic program objectives utilizing the power of the purse; *i.e.*, the leverage of the Federal Government's procurement needs. Indeed, the Federal Government's procurement process has long been used as a means of promoting public policies which are not directly related to the Government's principal procurement function -- the acquisition of goods and services in a timely manner from "responsible" vendors and at competitive prices. Thus, for example, the contracting process has been used to foster small and minority-owned businesses, to help overcome regional unemployment, to maintain competitive trade practices, to ensure the payment of appropriate minimum wages to employees and to protect the environment.

It is by most accounts consistent with the relationship between industry and the Federal Government that those who wish to profit from that relationship ought to comply with applicable law and reasonable government public policy objectives, including equal employment opportunity and affirmative action. In a broad sense, this policy is founded not only on constitutional imperatives, legislative mandates and judicial precedents, but also upon sound business and governmental policy -- the desire on the part of both industry and Government to maximize the effective use of the nation's human resources.

The use of the procurement process to impose specific nondiscrimination and affirmative action obligations is not new. Its genesis was in 1941, when President Franklin Roosevelt signed Executive Order 8802 which imposed a passive nondiscrimination obligation on defense contractors in the areas of race, color and national origin only. Twenty years into the evolutionary process which was to follow, President Kennedy became the first to require that Government contractors take "affirmative action" to avoid discrimination in employment. Although in truth this notion was that of then former Vice President Richard Nixon, who in 1959 urged its adoption upon former President Eisenhower, albeit it eventually became President Kennedy's legacy. Affirmative action began to take on its contemporary attributes, however, in 1965, with the issuance of Executive Order 11246 and with the establishment of the Office of Federal Contract Compliance Programs (then OFCC) in the Department of Labor the following year to administer the Executive Order.

Since that time the Executive Order program has been transformed from an essentially forward-looking cooperative effort between industry and Government to eliminate discrimination and provide equal employment opportunities, to an adversarial process seeking the imposition of hyper-technical and unrealistic affirmative obligations on Government contractors. In the process, the OFCCP has repeatedly overstepped the bounds of its authority, often defining the parameters of that authority in self-serving and ill-considered terms, and adopting hastily-developed policies. It has transformed a good faith "goal oriented" prospective and voluntary program into one with an unrealistic quota orientation laced with absurd make-work requirements benefiting no one. This counter-productive misdirection has left in its wake a litany of broken promises, illusory expectations and a properly and equally frustrated constituency among both those regulated by the program and those who are its intended beneficiaries.

The promise of equal employment opportunities for all persons desiring to live and work in our country is not yet fully realized, despite tremendous progress in this half-century. This dream must not be abandoned and it need not be. The business of business is business to be sure, but American industry has never sought to shrink from its role in the equal opportunity area and, with the help of Government agencies like that of the OFCCP whose intended mission was precisely that, the job unfinished can be completed.

The OFCCP's efforts should be directed once more toward establishing cooperative efforts between the Government and private contractors in order to stimulate and shepherd voluntary affirmative action and the eventual elimination of the underutilization of women and minorities in employment.

This Executive Order program can be salvaged and put on track once again.

II. Significant Problems Created By The OFCCP's Current Method Of Implementing The Executive Order

Serious questions exist with respect to both the legality of the Executive Order program as presently administered and the undue cost which it imposes on the procurement process. In the first instance, the OFCCP has imposed unreasonable ogligations, often of dubious legality, upon contractors.

The single greatest failing of the program -- its betrayal of the Presidential mandate behind Executive Order 11246 and its predecessors, has been the philosophical change in the program causing its thrust to be adversarial, retrospectively remedial, and all too often punitive. This has understandably eroded the resources of regulated contractors who must watch over their shoulder while trying to traverse the road to progress ahead, and otherwise has chilled the enthusiasm and dampened the vigor of those whose voluntary efforts brought progress, but now bring cynicism and recrimination.

A. Goals And Timetables v. Quotas

The claimed source of this requirement, the OFCCP's current affirmative action thrust, is the affirmative action mandate of Executive Order 11246 itself. There is to be sure no unanimity within the business community as to the continued wisdom of goals and timetables. That this is so reflects the disenchantment industry suffers with OFCCP's replacement of the use of "goals" as essentially devices to plan for and measure good faith efforts to attain progress in the placement and upward movement of minorities and women with de facto quotas. Yet the Order requires affirmative action of Government contractors only in Paragraph 1 of its seven paragraph equal opportunity clause which is to be included in nonexempt Government contracts. It is instructive to review this sole source of this authority to witness the extent of the OFCCP's transgressions:

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff of termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. [Emphasis added.]

It is thus apparent that the Order requires affirmative action in avoiding, e.g., sex and race-conscious decisions -- the very thing which the OFCCP's quota orientation requires.

This dichotomy is inexplicable, particularly as no president has ever issued or amended an Executive Order sanctioning the use of goals qua quotas and timetables -- which are purely the creation of the OFCCP, and its parent agency, the U.S. Department of Labor.

B. The OFCCP Lacks Authority to Require Retrospective Remedial Relief For So Called "Affected Classes"

There is an additional issue of great significance involving OFCCP's authority which warrants discussion. Illustrative of the OFCCP's retrospective view of relief available under the Executive Order is its position that it has the authority to award backpay and other relief for perceived prior acts of employment discrimination, however long ago they may have occurred! Nowhere in Executive Order 11246, however, is OFCCP granted that authority. The Executive Order itself does not provide for such relief nor for any retrospective "remedies" for those whom the OFCCP identifies as current or former victims of discrimination or inadequate affirmative action.

Furthermore, it consistently has been held by the courts that the Executive Order does not provide for a private right of action against an employer, recognizing the broad, prospective nature of the program and its linkage to future procurements of goods and services by the Federal Government. Indeed, the focus of the Executive Order program was intended to encourage Government contractors to make good faith efforts to increase female and minority utilization by the dismantling of workplace obstacles to equality, e.g., segregated locker and dining areas, etc., while reaching out to minorities and women so that they might join the ranks of applicants and employees in all jobs. Simply put, the purpose of the Order was to provide and ensure the continuity of access -- equality of opportunity. It was not to provide relief to suspected individual discriminatees, a function best left to the courts.

It would seem that Government agencies, and in this instance the OFCCP, often develop an institional momentum as their questionable, self-initiated courses of action escape effective oversight. Yet, no presumptive validity is justified.

Nor is the concern of business with the OFCCP's presently-charted course an idle one. Indeed, the OFCCP has the power to debar or blacklist a contractor with regard to future Government procurement opportunities and effect the cancellation of existing Government contracts, which for some contractors is no less than a death sentence. The power of OFCCP in this regard thus cannot be taken too lightly.

C. OFCCP Enforcement Often Includes Due Process Denials

Further, the Executive Order states that no order for debarment of any contractor from further Government contracts may be made without affording a contractor an opportunity for a hearing. OFCCP, however, until forced to change its position by adverse court decisions, consistently maintained that it had the right to "pass over" contractors where it unilaterally determined, without a hearing, that contractors were not meeting their contractual equal employment and affirmative action obligations. The OFCCP has actually reserved this "right" in its present regulations, albeit bending its policies a bit and promising future reform in its regulatory scheme.

A contractor is thus currently left with two options when it believes the OFCCP demands upon it are unreasonable, unlawful, or simply wrong. First, it could ask the Director of OFCCP to determine that OFCCP orders or directives raise substantial issues of law or fact which require a hearing. It is in the Director's sole discretion to determine if the contractor is entitled to an administrative hearing before being subjected to the loss of a Government contract opportunity. Otherwise, no hearing is held until "formal" enforcement proceedings have been set in motion. The contractor could, of course, comply with the OFCCP's demands in order to avoid a finding of nonresponsibility and the loss of a Government contract opportunity or dash off to court. Second, if it believes the demands of the OFCCP to be erroneous, a contractor could file a request for a hearing after compliance with the challenged directive of the OFCCP, and thereafter be afforded an opportunity for a hearing before the OFCCP. Obviously, neither alternative is terribly attractive.

All OFCCP hearings are held before an Administrative Law Judge, an employee of the Department of Labor, who issues a "recommended decision" which historically in almost every instance has been in OFCCP's favor. The final order is issued by the Secretary of Labor. Unlike the National Labor Relations Board for example, there is no division of prosecutorial and adjudicatory authority between a wholly separate General Counsel and Board. The actions are thus initiated, tried and decided by essentially the same body. Also of significance is the fact that the decision of the Secretary of Labor as to debarment is administratively final.

There is no need for him to seek enforcement in court, as the NLRB must do.

D. The OFCCP Imposes Excessive Demands For Data From Contractors

Clear examples of the OFCCP's abuse of its debarment authority exist in cases where its authority to make unreasonable demands for submission of information or to demand unreasonable goals or quotas has been challenged. In its Compliance Review Manual, which has never been published in accordance with Administrative Procedure Act requirements, the OFCCP lists the information which must be turned over to the OFCCP upon request. As much of the information OFCCP routinely requests is not clearly required to be produced by regulation, contractors over the last several years have challenged the OFCCP authority in this regard, with resulting debarments.

When broad requests for information are made, contractors have the option of requesting a hearing, subject to the discretion of the Director, or of complying with the discovery request and then formally requesting a hearing within ten days. Contractors are extremely and justifiably reluctant to release sensitive and confidential information to the public pursuant to Freedom of Information Act requests.

In the last two years, OFCCP has debarred several contractors after hearing for refusing to turn over disputed material, in spite of the fact that the Agency's authority to debar a contractor for denying it access to contractor data is less than clear. In each instance, when the contractor refused to disclose the requested information, the OFCCP began enforcement proceedings before an Administrative Law Judge pursuant to its formal hearing procedures, seeking to debar the contractor for this alleged violation. Not surprisingly, in each instance the contractor was debarred.

Uniroyal, Inc., for example, was debarred for failure to comply with the OFCCP's prehearing discovery demands in spite of the fact that it requested a stay of discovery proceedings until the lawfulness of the OFCCP's position could be determined. The request for a stay was denied on the ground that Uniroyal had contractually agreed to comply with the disputed OFCCP discovery attempts. Similarly, Prudential Insurance Co. was debarred for refusing to turn over computer tapes containing personnel information, despite the fact that Prudential was willing to turn over the raw data itself rather than the computer tapes.

Illustrative of contractor frustration over the excessive demands of OFCCP is the case involving First Alabama Bank which was debarred for refusing to turn over any information to the OFCCP. The Bank's refusal to turn over affirmative action plans was based on its claim that it had been subject to an exorbitant number of OFCCP compliance reviews and EEOC investigations in recent years and that it was essentially being harassed by the Government. The Administrative Law Judge and the Secretary of Labor made light of this argument, but the District Court reversed the Secretary's debarment order, holding that the OFCCP's demand for information would have resulted in an unreasonable search and seizure in violation of the Fourth Amendment. In so holding, the

Court noted that the Bank had been subjected to an excessive number of demands, that the information may have been available from other sources, and that the OFCCP had received no complaints of discrimination by the Bank.

Firestone Tire and Rubber Co. also chose to take issue with certain procedures of the OFCCP, and as in the case of the Bank, Firestone was debarred. At issue in Firestone was the contractor's challenge to "Technical Guidance Memo No. 1," ("TGM 1") an internal "regulation" of OFCCP, which purported to interpret the requirements of Revised Order No. 4 and to provide technical information with regard to the development of affirmative action plans. Firestone refused to declare underutilization of females or minorities in any job category unless the underutilization was statistically significant. This refusal was contrary to TGM 1. OFCCP thus initiated administrative proceedings to debar Firestone and ultimately debarred the Company. A Federal District Court reversed the debarment order, because OFCCP had implemented TGM 1 without compliance with the Administrative Procedure Act. It is noteworthy that when the shoe is on the other foot, OFCCP itself prefers secrecy and nondisclosure to openness and candor. Thus, our firm has recently succeeded in its litigation against the OFCCP under the Freedom of Information Act, forcing open the "sealed" investigative targeting system, etc. which was heretofore withheld from public scrutiny.

III. OFCCP Regulations Conflict With Judicial Precedent Which Has Held That No Employer Should Be Required To Select Any But The Most Qualified Person For Any Position As Long As The Decision Is Unbiased

OFCCP has also created undue and excessive burdens for contractors by its extensive involvement in the employee selection process, most significantly, in its giving weight to employee ethnic, racial or sexual status often as a measure of employee qualifications and abilities. For example, OFCCP regulations currently provide that a contractor should never require a woman or minority employee to possess higher qualifications than those of the lowest qualified incumbent employee. Is it desirable that industry be forbidden from raising the standards of quality amongs its personnel and perhaps thereby its products and services? Given the perception of a decline in the quality of American goods, deteriorating productivity performance, and difficulty competing in foreign markets or with foreign goods, most reasonable minds would reach a contrary conclusion.

Title VII cases traditionally have held that any employment decision to hire the best qualified candidate for any given job can withstand judicial scrutiny as long as the decision is not biased. Indeed, under Title VII it is well established that a desire to hire the more experienced or better qualified candidate is a nondiscriminatory, legitimate and common reason on which to base a hiring decision. Examples include the recent reaffirmation of this principle in the Furnco and Burdine decisions of the United States Supreme Court.

To be sure, there is no paucity of qualified minorities and women in most occupations, and their numbers continue to swell as socio-economic barriers are leveled and minorities and women are given the educational and training opportunities they deserve. Nevertheless, it will take some time to increase the availability of minorities and women in some occupations and within certain professions before they may be at approximately parity with the population as a whole.

An EEO enforcement methodology which pretends this is not so serves no one well. If qualifications are compromised, if other than the best qualified candidates are hired (assuming valid selection criterion) resentment grows among a work force, quality of work suffers and the affected employee's self esteem plummets as he or she fails on the job. This is no more than disingenuous paper progress and buck passing, and while business should not retreat from its chance to help (particularly in training, counseling, etc.), it should not be asked to compromise on job related qualification and skill indicia.

IV. The Future Role Of The OFCCP

It is sometimes necessary to step back so that an advance can resume, to return to a charter and reorder priorities. The course of action which may best preserve a role for the OFCCP may be as follows:

1. Simplify the now onerous, wasteful and often unnecessary paperwork requirements of the program by demanding fewer affirmative action plans for mult-facility contractors, and less elaborate statistical compilations and analyses. Simple yet effective yardsticks for determining progress in the employment and upward mobility of minorities and women requires no multi-factor statistical analyses. Current annual EEO-1 reports already provide a useful indicator -- certainly an adequate first look and one which may render further scrutiny less necessary.

2. Elimination of "penalties" for past conduct, i.e., backpay for so called affected classes. The OFCCP should be principally concerned with future progress, and defer to the EEOC and the courts -- those bodies Congress has vested with authority to resolve and award backpay and other retrospective relief -- for resolution of discrimination claims.

3. The future participation by Government contractors in the Government procurement process should be linked to good faith, cooperative efforts toward the achievement of future objectives and only the unwillingness of a contractor to chart such a course should bar that participation.

4. OFCCP resources should be directed toward the rendering of technical assistance to contractors to enhance the pool of qualified minority and female applicants for employment. To throw the baby out with the bathwater by wholly dismantling the Federal Government's affirmative action framework is, in sum, unnecessary and unwise, but major rehabilitative surgery must be performed to save this worthy program and to restore the partnership of industry and Government.

The **Chairman**. Your full statement will be placed in the record as though fully delivered.

Our next witness will be the eminent civil rights advocate and lawyer from Washington, D.C., Mr. Joseph Rauh, representing the Americans for Democratic Action.

Joe, it is nice to welcome you to the committee and always good to see you.

Mr. **Rauh**. Senator Hatch, it is always a pleasure to debate with you.

The **Chairman**. We have certainly had them in the past, is all I could say, and you more than hold your own. You have beaten me up pretty badly on occasion. [Laughter.]

Mr. **Rauh**. You are a pleasant antagonist and I hope we will always keep it that way, Mr. Chairman.

The **Chairman**. Well, I think we can.

STATEMENT OF JOSEPH L. RAUH, JR., VICE PRESIDENT, AMERICANS FOR DEMOCRATIC ACTION

Mr. **Rauh**. With me is Jeff Morley, who is the legislative assistant of the ADA. We appreciate this opportunity, most sincerely, to testify this morning.

I would like, if you will permit me, to start on a personal note. In the middle of June of 1941, I was the Deputy General Counsel of the Office for Emergency Management. My boss, Wayne Coy, called up—this is 40½ years ago but it is as though it happened yesterday—and said, "Get over here." He was President Roosevelt's Office for Emergency Management Director.

He said, "There is a guy named A. Philip Randolph who is going to march on Washington if somebody does not write an Executive order that will provide for equal employment." He said, "Can you write an Executive order?"

I said, "Any jackass can write an Executive order. The real question is, What do you put in it?" [Laughter.]

He said, "Well, I got my orders from Mrs. Roosevelt and Fiorello LaGuardia, and they want you to put in anything you can think of that will stop employment discrimination."

That is where this all started. I went down to the Budget Bureau, and together we wrote an Executive order. The Justice Department fooled around with it a little bit but not much. What we wrote down in the Budget Bureau is what became the first Executive order.

Randolph kept saying, "It is not strong enough." We kept trying to make it stronger but finally we could not think of anything stronger and he called off the march on Washington. This fight today to save the Executive order, to keep it strong, has a great history. The Executive order is something that was fought for, bled and died for, and if I am a little possessive of it I hope you will forgive me.

The **Chairman**. Certainly.

Mr. **Rauh**. To me, affirmative action is just this: goals and timetables for employment of minorities and women that are reasonable, with preferences to minorities and women to meet those goals and timetables where the applicants for the positions are qualified.

I believe in this very sincerely but for only a limited time in our history.

I think that there will come a time in this country when affirmative action will be unnecessary; when you will not have to take any such steps; when everyone will be treated equally. However, you cannot start that way now. There are too many differences now in our society to put everybody on a par and say, "Start equal." You cannot do it. They are not equal. Centuries of discrimination have kept society from being equal.

There is one simple proposition I would like to put to you: Equal treatment of unequals is inherently unequal. Think about that for a second. You are saying, "Let's have everybody treated absolutely equally." I would be for that if everybody started from the same place. But too many groups start from behind today, and you should not try to turn your back on affirmative action yet.

I rather doubt I am going to live to see the day when you do not need affirmative action but I think you will, Senator.

The CHAIRMAN. You are very gracious. [Laughter.]

Senator Kennedy has already knocked 25 years off my life, just associating with him.

Senator KENNEDY. Only 6 years. [Laughter.]

The CHAIRMAN. Only 6 years? Well, we are hoping that both of us will retire next year. [Laughter.]

Mr. RAUH. I think you Senator Hatch are going to make it because I believe this struggle is generational. It may take a decade, it may take longer but it can be done. However, it cannot be done unless we recognize that affirmative action is still necessary.

You see, Senator, our economic differences are terribly divisive in this country today: 15.5 percent of blacks are unemployed, whereas it is less than half that for whites; differences in earnings between men and women are a national scandal. What we have to do is try to change that. As long as that goes on, as long as there are these terrible differentials in our society, that is going to be a divisive force.

I dream of a society where you are not going to have these differentials based on sex or based on race. Until that comes, you are going to have to stand by affirmative action. I recognize the problems. Look, I recognize that any preference in our society is also a loss of a preference for someone else. This would not have been my choice for a method of dealing with a terrible societial problem, but there is no other remedy.

Voluntary remedies have not worked, sir. I have marched in the South, and all they would say was, "If you outsiders will leave us alone, we will take care of racial discrimination." Rubbish. There was no hope for that in the South and there is no hope that we can do anything in employment unless there are rules employers have to follow.

I have to make one point to you about your administration. It says: [Laughter.]

No, no. This is not meant to be in any way invidious. The administration sometimes says, "Well, we do not believe in affirmative action." Yet you are the greatest practitioners of affirmative action that there are. Let's look for a second: There is one important administration white appointment, one important black appointment;

one important white woman appointment, one important black man appointment.

There is nobody in this world who would say that Sandra O'Connor was the best qualified person for the Supreme Court.

The CHAIRMAN. Well, I am saying it, I will tell you right now.

Mr. RAUH. Not the best qualified in the whole United States, not the best scholar, but——

The CHAIRMAN. Joe, how many arguments do you make a year before that Court? I had better stop you now so that you do not become ex[illegible]sive. [Laughter.]

Mr. RAUH. Well, you came in in the middle of a sentence. [Laughter.] The fact is that she is qualified, and, on the theory of a preference for women in which I believe, she was properly nominated and confirmed. But it was clearly affirmative action. Take Secretary Pierce, a very important black appointment. They say, "Well, we should have"—as I believe—"a black in the Cabinet." He was not the most expert in the urban area. He was not the best manager for that job. But he was qualified and I believe he was properly nominated and confirmed.

In other words, I am seeing a lot of people—and the administration is included—who use affirmative action at the same time they denounce it. I think these are two great cases of affirmative action.

The CHAIRMAN. I do, too, but in both cases they were voluntary.

Mr. RAUH. You mean, President Reagan did not have to appoint them.

The CHAIRMAN. That is right.

Mr. RAUH. They were voluntary in that sense, yes.

The CHAIRMAN. In other words, in both cases.

Mr. RAUH. I agree that that was what you would call——

The CHAIRMAN. They were not compelled by the OFCCP or by the EEOC——

[Laughter.]

Mr. RAUH. That is correct.

The CHAIRMAN [continuing]. If I can make myself more clear.

Mr. RAUH. However, President Reagan I believe utilized the principles of affirmative action, for which I am speaking, in those cases.

The CHAIRMAN. I agree with that. You and I are part way down the road together.

Mr. RAUH. My God, this has gone better than I thought. [Laughter.]

The CHAIRMAN. Well, miracles occur, you know. You have always been very persuasive.

Senator KENNEDY. Of course, Joe, President Reagan also made that commitment during the course of the campaign.

The CHAIRMAN. Senator Kennedy would have you believe——

Senator KENNEDY. That was the fulfillment of a commitment. I think when we are talking about trying to get compliance, I would imagine that if you made that statement and made that commitment, then you have some responsibility to carry it forward. Therefore, it is an entirely different situation. When you are talking about a President, there is no one forcing him to do it. He made a commitment that he was going to do it and he fulfilled it.

The CHAIRMAN. Yes, and after the last 4 years it is nice to see a President who tries to live up to his commitments. [Laughter.]

Senator KENNEDY. Like a balanced budget. [Laughter.]

The CHAIRMAN. After 50 years of what we have had.

Joe, I feel like we have cut into your time somewhat. [Laughter.]

The CHAIRMAN. We will not rely on the yellow light or the red light.

Mr. RAUH. This is such a good show, we ought to take it on the road. [Laughter.] Thank you very much for the additional time but I do not need too much.

I would like to answer the point about excessive costs to business in this field. The figures really do not back that up. On page 9 of our statement we point out that banks—this comes from the Business Round Table and should be accurate—the Business Round Table survey estimates that banks spend only one one-hundredth of their gross revenues in establishing and operating their affirmative action programs; that OFCCP spends $1.26 in Federal revenues to cover each of 40 million workers. I think that is very small for the social value that we get out of affirmative action.

It just seems to me that at this time—I recognize that this is possibly not an overwhelmingly majority position—we ought to expand rather than curtail affirmative action. Let me put it this way: I think, Senator, that the administration is sending the wrong signal. I think the signal to business ought to be: "We have to get rid of the differential in employment between black and white; we have to get rid of the differential in pay scales between men and women. We have so much to do here. Let's have you do your part."

OFCCP is one place; EEO is another. There are many ways to deal with this problem. Justice is another agency that can deal with it. If you tell business you are going to be firm, they are going to comply. But if you send the signal, "Well, we think there is something wrong with this. You do not have to do anything much here. Do it voluntarily if you want." I am saying you are going to perpetuate the most divisive possible thing in our society, racial differences in employment and pay, sexual differences in pay.

I do not think you want to perpetuate that. I would be the last person to say Chairman Hatch wants to perpetuate that. I am simply saying, coming back to where we started a long time ago, 40 years ago, from 40 years of experience I can say to you that there is no other way to root out those differentials than affirmative action. I hope you will leave affirmitive action alone.

The CHAIRMAN. Thank you. We appreciate your testimony.

The only thing I would like to point out before turning to Senator Kennedy is that I think almost everybody will agree, even prior to this administration, that it is pretty well public knowledge that the Department of Labor, the Department of Justice, the EEOC, they all differ on their interpretation of goals and timetables. They do not even talk to each other, and that is one of the problems.

We have had testimony here today from Mr. Green, who is very critical of the OFCCP but does not want to abolish it. Frankly, most of our witnesses against affirmative action have been critical of affirmative action but do not really want to abolish Executive Order 11246, or at least want it to be interpreted as it was originally intended, or at least as they feel it was originally intended.

Now there have been some who do. In any event, I personally appreciate all of the efforts you have made through the years to promote your particular viewpoint.

Mr. RAUH. May I say this one thing to you, Senator Hatch? I think Mr. Green is wrong when he says that goals and timetables have turned into de facto quotas. If they have, I am against them. I want to make this perfectly clear: I do not favor quotas.

I think an employer has a right to say, "I could not find qualified people to meet my goals and timetables." I think he has a right to say that. I do not believe that he should go out and, by a quota, be forced to hire unqualified people. To me the permissable preference is only among qualified people. That is why I had the courage to use Mrs. O'Connor's name, even though I will be appearing before her in a case not too far off.

However, the fact remains that among lawyers you have a big pool of qualified people. What is wrong with giving a preference to a black or a woman within the pool of qualified people? I would be opposed to quotas which would cause anybody to hire unqualified people; that would be an absurd result. I think people who use the word "quotas" are trying to give the impression that someone would have to hire unqualified people. I am not for that. I am not for quotas. I am for preferences among qualified people.

The CHAIRMAN. Thank you.

Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Rauh, for an excellent comment and statement. I would like, Mr. Chairman, if I could, to include some opening remarks for this hearing in the record.

There have been many points that have been raised over the course of these hearings. You have touched on what I consider to be the essential points. However, what are the best arguments to deal with the fact that there are so many agencies, conflicting rules, conflicting regulations, that this has been a source of harrassment for the business community? We have heard that, now most recently by the chairman of this committee; we hear it on the floor of the U.S. Senate. What is the best way to deal effectively with that charge?

Mr. RAUH. You have heard testimony about harrassment, but I do not think you meant to use that word as though it was in fact a common practice. There are many areas where Government makes life difficult for some people. I saw on "60 Minutes" what the IRS people do to some small businessmen. I wanted to get out and help the small businessmen in those cases because I am against Government harrassment of anybody.

I do not feel that that is what is happening here. If on occasion there are different standards, in determining discrimination, that is wrong. The same standard should be used at Justice, EEO, and OFCCP. Of course, you should use the same standards. You should also try to have the same forms. But that is not what this argument is about. As a matter of fact, OMB's job—their real job, not the one they have been doing on the budget but OMB's real job—is to see that you get a consistency of forms so that an employer would not have to fill out one form here and another form there.

I do not think that is wise. I think you could through a proper system of reports and forms, see that whatever the harrassment cases may be, that they are much reduced. Of course, there should be the same standard in each Government agency. Of course, they should try to work out one form. That is an effort to make it work better.

I think a lot of the criticism of affirmative action is from those who do not want it to work. I think Senator Hatch and I have differences here, but I think he would like to see differentials eliminated, too, if it were possible.

The CHAIRMAN. I would.

Senator KENNEDY. Well, one of the points that is made is that we need some new approaches in this whole area of public policy. What do you think is wrong with the system that we have at the present time?

Mr. RAUH. I do not think anything is really wrong with it in that sense. I think what has happened is that people are unsure how much the present people administering the laws are dedicated to their inforcement. I think there is some feeling among business now, "Well, we do not know where it is going. It is uncertain. We do not have to do as much as we thought we did."

I think a declaration by the administration and its agencies that, by God, we are going to enforce the present rules, would do more to get blacks and women and Hispanics and others hired and promoted than anything you could do. I think right now there is an uncertainty about where we are going in this country, and that uncertainty encourages people not to go out and try to find and hire qualified minorities and women.

Senator KENNEDY. Well, do you think that is the signal that is going out with the proposed changes?

Mr. RAUH. I think the signal that is going out is a signal of waivering, of uncertainty. The trumpet ought to blow a very firm signal. We have the procedures that can do the job. We have the procedures; what we really need is the heart behind them.

Senator KENNEDY. Many of the witnesses at the hearings on the OFCCP have alleged that the Executive order does not authorize the imposition of back pay as a remedy for discrimination. What is your view on the authority conferred by the Executive order in this regard?

Mr. RAUH. I think that Congress has ratified that by the number of times they have made appropriations for enforcement without questioning it. I would have thought it was valid from the beginning on the theory that the President's power in connection with procurement includes power to set up a procedure of the kind he did. But I also think you can go beyond that and say that this has been ratified over and over by the appropriations from the Congress.

Senator KENNEDY. What about leaving the remedy for back pay to the individual, to pursue that through the courts versus an agency action? What is the distinction in terms of realizing equity in that case?

Mr. RAUH. Simply that the people who——

Senator KENNEDY. Why is the OFCCP a better forum for it?

Mr. **Rauh**. I think an administrative forum is faster all the time. If you will remember, Senator, when we were working on the housing bill last year we were all seeking an administrative forum, and we lost that battle for the administrative forum. However, I think the civil rights movement, has found the greatest successes in the administrative forums.

It might be well to put it this way: The administrative forum is largely wholesale. Going to court is retail. You get many more quick actions administratively than you can through the courts. The administrative process is faster and more hopeful of getting results. I would rather have a judicial process than none at all. To be perfectly honest about it, I would certainly hate to give up the whole process.

Senator **Kennedy**. This is another area that we are going to consider in the various civil rights legislation in this Congress, and I want to get your views on it: One of the most controversial aspects of the equal employment law has been the standard of proof required to establish the violation of the law. The opponents of affirmative action have argued that violations should be found only where the defendant has intended to discriminate.

This issue has arisen not only with respect to the equal employment connection but with the fair housing law, and now more recently with the voting rights extension. The record of these hearings does not yet include a discussion of this issue from the perspective of the civil rights community, and I would like you to state for the committee just what the consequences would be if we required proof of an intention to discriminate in every case.

Mr. **Rauh**. Proof of intent is terribly difficult today. It was not too hard when I was starting out in the civil rights field. People would call other people dirty names. It was easy to prove intent in the old days when words were bandied around like "nigger" and things like that. That is over. Discrimination today is subtle. Discrimination is carefully veiled. Effect is the only fair standard today.

Now you might say that if intent means what it means in some areas, it would not be too hard to prove. To me, a person ought to be held to intend what he reasonably believes is going to happen, and that is in part an effects test. To make a person prove that his employer intended discrimination against blacks or women is almost impossible today unless you say that the fact that he did something which resulted, which caused the effect of discrimination, is the equivalent of intent.

Now this thing has gotten all upside down in these discussions. The people who support intent—and I debated this with Senator Hatch in the period of the housing bill last year—they were supporting the idea of intent but without being willing to put in the principle that the intent is usually—almost always and I might almost say always—the intent was what resulted from the action.

Unless you say intent includes the principal that a person intends what effect he causes, I think you could not enforce civil rights laws. I think voting rights is the area where we are going to get a decision from Congress in the next months because that will be the major difference, I believe, between the civil rights forces and the administration. I do not see that there is much else that we have to argue about, after the administration's statements and after the overwhelmingly passed House bill. Therefore, I think we will know something about intent and what Congress believes in that area after the voting rights bill is settled in the Senate.

However, for us an intent test without also saying that you are intending what you are effecting, will weaken civil rights enforcement in every field, and employment will certainly be one of them.

Senator **Kennedy**. Well, the argument—and you are familiar with it—on the other side says, "Well, in all the other aspects of the law, in going to court, we look at intent, specific intent." There are all kinds of definitions: Knowingly, willingly, unknowingly, unwillingly, the whole range of different attitudes in people's minds.

An intent test has a ring to it in terms of the American sense of fairness and equity. Why should we be holding people to a standard if they did not intend it? This is something we have heard more and more of during the recent months and in the very recent years.

Clearly, as you correctly pointed out, in the area of equal employment as in other areas the effect of the intent has been both the legislative standard and the holding by the Supreme Court. Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation. That is in *Griggs* v. *Duke Power Co.*, and there are a number of other holdings.

Now is it your sense that any retreat on that aspect or any alteration or change of that test will be a significant retreat on the whole process and the whole commitment, whether it is in the area of equal employment or voting rights or any of the other civil rights areas?

Mr. **Rauh**. I think that is the biggest legal question in the civil rights area today. The effects test was clearly the law of the land recognized by the Supreme Court up to the *Davis* case, where the Court started going more into intent. However, Congress has the final say and if Congress wants to enforce civil rights laws, they have to use effect.

There are two ways you can use the effects test. You can say effect has to be proven as such or you can say that the individual who did the act is deemed to have intended the effect he caused. I do not find too much difference between those two principles but I find that in this area people are forgetting that most people intend what happened as the result of these acts. That is what is going on in the civil rights area, too.

I think if you put intent in the law and you really mean you have to show employers had some bias against blacks, bias against women, I think you will have a monumental decline in the enforcement of civil rights in America.

Senator **Kennedy**. Now if we had used that intent test as narrowly defined, in the more narrow tradition, how much progress would we have made, do you think, since 1964?

Mr. **Rauh**. It is a rather Solomonic question but I think our progress would have been not a particle of what we have done. I want to agree with Mr. Goldstein's testimony earlier: A lot of progress has been made in this country. A lot of progress has been made since even the first Executive order in 1941 but the greatest progress has been made since President Kennedy sent up what became the 1964 law and Johnson sent up the 1965 law. A lot of progress has been made that would not have been made any other way.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Mr. Rauh, on your administrative approach, we have had a number of witnesses testify before us like the Bank of the West: They have been 18 months in an administrative procedure, not one finding of illegality or wrongdoing and $90,000 in costs; the Bank of Greenwood, 100 employees, 3 years in review and over $100,000 in costs. They say that that is typical of many reviews done by the OFCCP. St. Regis Paper spent 6 years in review, all under administrative review. Purdue University testified here and had stacks of volumes of compliance that they had to meet, and they have been under review by the OFCCP for 11 solid years.

Therefore, you see, I have a lot of difficulty, and I think that the hearings have shown that there is some sympathy for keeping the OFCCP going but there is a lot of irritation with the way it has handled itself over the last number of years. You have even indicated that to a degree.

Now with regard to intent, as you know that became the principle issue in the housing debate that we had because many of us feel that really a person should not be branded a discriminator unless there is some proof of intent. We even went so far as to say, "direct or indirect, circumstantial or otherwise, including proof of effects or disparate impact," and that was unacceptable to the civil rights community.

I agree with you: I think the most important issue in the civil rights battle over the next 10 years is going to be the issue of intent. I disagree with you that Congress can decide that because the Supreme Court in the *Mobile* case has pretty well come out and said that under the 14th amendment you have to prove intent before you can brand somebody—under both the 14th and 15th amendments—before you can brand somebody a discriminator.

Now my point is this: We prove intent in courts of law every day. In criminal cases we have to prove intent beyond a reasonable doubt. In civil cases we prove intent by a preponderance of the evidence. I, as a practicing lawyer—and I know you are a practicing lawyer and you have tried many cases—well, I tried a lot of cases too for the length of time I practiced law. We had to prove intent in every one of those cases, and I never had any difficulty proving it where there was in fact a case, where there was in fact a case to be made to begin with.

Therefore, I really think that, sure, it would be easier to brand everybody one thing or another if you can just use effects, or disparate impact, or statistical analysis. However, that does not make people discriminators and that is where I have so much difficulty with this and, as you know, sincere difficulty with it because we went over this long and hard the last time. I am going to have difficulty with it on the Voting Rights Act as well because it just is not right to call people guilty of discrimination when they never intended to be guilty of discrimination, or never intended the effects or the act that occurred.

Mr. RAUH. May I make this suggestion. If you use the effects test you do not have to say that the person who created the effect is an invidious discriminator. If you say you have to prove that he has bias against blacks or bias against women, to that extent you are making an invidious charge against him. But if you are saying the effect of his action is discriminatory and badly hurts women and minorities, then it seems to me you have a different situation.

I am not going to say that every company that contributes to the effect of unemployment of blacks, every company that contributes to these various things, by that fact there is some invidious charge against them. What is happening is that the effect of their actions is the unequal result. It seems to me unfair to stigmatize everybody, whether or not they are an intentional discriminator.

I am saying that where in fact you look at the result and that is unequal, then you do not have invidious intent. You cannot say, "Well, that guy deliberately did that." You get a much more invidious result under the intent test than you do under the effects test.

The CHAIRMAN. Thank you, Mr. Rauh. We are glad to have you here with us.

Senator KENNEDY. Just before we finish on this, you understood that the OFCCP staff has been cut from about 1,300 last year, in 1980, to 840 next year. You have heard that. Do you have any reaction to that?

Mr. RAUH. Yes. I was going to interrupt Senator Hatch when he was giving me all the figures on the long time these cases take but he went on to the other subject of intent so I did not get a chance to make this point. I know it takes a long time to get results and I am as much against that as you are. However, OFCCP has to have staff and the budget cuts are going to make it worse. If you think it is bad now, when you get done with the budget cuts on OFCCP it is going to take even longer. I would think if you really wanted—

The CHAIRMAN. How are we going to reach that balanced budget, if we do not do that? How are we going to reach that, that Senator Kennedy wants so badly?

Senator KENNEDY. I have a few ideas.

The CHAIRMAN. Well, if you do they will be the first ones I have ever heard, I will tell you.

Mr. RAUH. Give the OFCCP the funds they need and let's get rid of these long proceedings. I agree with you, they are too long. However, I have a different remedy. I think you ought to put up the funds to get OFCCP the people to do the job.

The CHAIRMAN. Well, you have given us some good remedies here today and your testimony has been very helpful to us in a number of ways. We are certainly going to pay attention to it.

Senator KENNEDY. If I could just finish my question——

The CHAIRMAN. Oh, I thought you had finished.

Senator KENNEDY. I get interrupted and then you wind it down. [Laughter.]

Just a final point, Mr. Rauh, and I think it is one that has been touched on during the course of the exchange this morning, but I think it is important that it is made clearly: The point is made that business men and women in this country basically want progress made in terms of the elimination of discrimination; progress has been made over the years of the past. Why don't we give voluntary compliance a chance at this time? The second part would be, can you expect voluntary compliance really to work if you do not have a strong remedial program?

Mr. RAUH. I think my answer to the second question answers the first: You cannot expect voluntary compliance to work. It has not worked in any area. You do not have voluntary compliance with red lights in traffic; you do not have voluntary compliance with your taxes; you do not have voluntary compliance with anything that you really believe in strongly. You have voluntary compliance where you really do not give a damn what happens.

If you really care about something, you have to have a legal standard and a punishment if there is no action. It is only where you do not care about something that you can say, "Well, let's leave that to the voluntary area." If you care deeply about civil rights, as we did when we marched in the South—I have had "outsider" thrown at me in Alabama in Martin Luther King's march and in Mississippi when we were fighting for the Freedom Democratic Party. They would say, "Outsider, outsider, leave us alone and we will do it." In the history of our country, that has not worked.

Did I answer your question?

Senator KENNEDY. Very well. Thank you very much.

The CHAIRMAN. That is right. I have to agree with you there. Thank you, Mr. Rauh.

[The prepared statement of Mr. Rauh follows:]

TESTIMONY OF JOSEPH L. RAUH, JR., VICE PRESIDENT, AMERICANS FOR DEMOCRATIC ACTION

Mr. Chairman, my name is Joseph L. Rauh, Jr. and I appear here this morning on behalf of the Americans for Democratic Action, of which I am a past national chairman. We appreciate this opportunity to express our views on the vital subject of equal employment opportunities. I am also the general counsel of the Leadership Conference on Civil Rights, but I do not purport to speak this morning for all of the more than 150 organizations that comprise the Conference.

Mr. Chairman, many routes to equal employment opportunities have been suggested. We in ADA believe the only effective way to pursue the goal of improving employment opportunities for minorities and women is through affirmative action.

The term affirmative action means different things to different people. Some say they are for affirmative action, meaning little more than that they favor employer advertising to make sure minorities and women are aware of job opportunities and will be considered for the openings. Other support quotas as their concept of affirmative action. Our definitions falls between these two concepts. We believe that, for a limited period of time and for the purpose of remedying the effects of past discrimination as well as preventing future discrimination, employers should be required to meet reasonable goals and timetables for the employment of minorities and women and should give preference to qualified minority and women workers to reach those goals and timetables. There is flexibility in goals and timetables that differentiates them from quotas, for good faith inability is a defense to a complaint of discrimination. Anything less than goals, timetables and preferences will leave the existing differentials produced by centuries of discrimination untouched and untouchable. Last Saturday's Washington Post reports that unemployment for blacks and other minorities stood at 15.5 percent last month, more than double the rate for whites. The differentials between the earnings of men and women and whites and blacks remain a national scandal. And the differentials in both employment and earnings become even greater as one goes up the employment ladder. Affirmative action is the only effective remedy for such gross inequities. We must act through affirmative action or face forever a nation divided by the continuing effects of past discrimination. President Johnston affirmed the principles of affirmative action in 1965, stating:

> You do not take a person who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair.

Put another way, equal treatment of unequals in inherently unequal. Affirmative action has become the primary tool for achieving equality in the areas of employment.

Those who oppose affirmative action bear the burden of proving that person and groups "hobbled by chains" can compete fairly in the marketplace. If the opponents of affirmative action insist that there are ways other than affirmative action to assist minorities and women in the job market, they must prove that those remedies can be as effective as affirmative action. These are the crucial tests for the foes of affirmative action, and those foes regularly fail these tests. Practically speaking, there is no alternative available to American society -- a society dedicated to principles of equality and fairness -- that works as well as affirmative action.

One cannot help but smile at the people who utilize affirmative action at the very time they publicly delpore it. The perfect example, of course, is the Reagan Administration whose major appointments of a woman and a black to high poisitons were exactly that. No one would contend that Justice Sandra O'Connor was the most qualified lawyer for the vacant spot on the Supreme Court. But she was qualified for the position and on the theory of a preference for a woman, was quite properly nominated and confirmed. No one would contend that Secretary Samuel Pierce had either the expertise or management skills to make him the most qualified person to be Secretary of HUD. But he was qualified for the position and, on the theory of a preference for at least one black in the Cabinet, was quite properly nominated and confirmed. Why is it different for others to give preference to a qualified minority member or a woman to meet a reasonable goal or timetalbe? We say expand, not curtail, affirmative Action,

The implications of the anti-affirmative action position can be seen clearly in the Reagan Administration's proposed changes in the regualtions of the Office of Federal Contract Compliance Programs (OFCCP). These regulations, issued August 25, 1981, demand the closest scrutiny by the Congress and the general public. They depart radically from the principle of affirmative action as it has developed through the last five presidential administrations -- three of them Democratic, two of them Republican.

A.D.A. opposes these revised regulations and urges a return to the regulations promulgated under the Carter Administration on December 30, 1980. The new Reagan Administration regulations will weaken the affirmative action requirements for government contractors. Higher coverage thresholds will remove a significant number of firms from submitting needed written affirmative action plans, enforcement measures will be restricted, grievance procedures will be hampered, and the entire practice of affirmative action undermined.

What common thread of philosophy runs through the wide variety of proposed changes?

* It is not simply the impluse to streamline the government because the the costs, direct and indirect, of OFCCP regulations are not great.

* It is not solely a political payoff for electoral support because the sheer variety of the proposed changes go beyond the scope and the demands of special-interest groups.

*It is not a new approach to the old problem of civil rights because it is no approach to civil rights at all.

No, the Reagan regulations disclose something much more ambitious. In conjunction with the Administration's meager record in appointing women and blacks to high government positions, with the Administration evisceration of programs for working people, for the elderly, for the poor, and for minorities, and with the Administration's opposition to the House-passed Voting Rights Act extension, the Reagan OFCCP regulations only confirm the suspicion that the very principles of basic civil rights are under ideological seige. The Americans for Democratic Action are determined to turn back this siege. Opposing these unneeded, unjust revised regulations is one important step in this struggle.

The Assistant Attorney General for Civil Rights, William Bradford Reynolds, testified in September, that the Reagan Administration was committed to "full and effective" enforcement of civil rights laws. But Reynolds went on to denounce affirmative action programs as "quotas" giving preferential treatment to "non- victims" of discrimination. The new OFCCP regulations are clear proof of how such philosophy translates into policy. The result is governmental action that guts, not enforces, civil rights law. Under this Reagan Administration approach discrimination will not be countered but countenanced.

The specific implications of the revised OFCCP regulations are many; I can only touch on a few of them here. With limited time I want to focus your attention on those regulatory changes that not just weaken the technical mechanisms for enforcing the law, but that demonstrate the Administration's disregard for the principle of equal opportunity.

In attempting to guage the costs and benefits of the proposed regulations, the Department of Labor looked at just one factor: the expense to business. The Department did not measure the costs of greater minority and female unemployment and job segregation that might result from weakened affirmative action guidelines. It did not examine whether the reduced federal role might result in more privately-initiated job discrimination suits and therefore, in higher costs for both business and government. Instead the Labor Department blandly contends that employee protections afforded by the regulations would not be reduced significantly. This is a thesis supported by ideological faith only; it is not supported by any close scrutiny of the facts. The important fact is: Employee protections under the proposed regulations would be reduced severely.

The Labor Department claims, for example, that the new regulations, requiring written affirmative action plans only from federal contractors with more than 250 employees and a $1 million contract, will still cover 75 percent of now-covered workers. The Department however, admits significant weaknesses in its own statistical analysis. In any case, the Department is raising the coverage threshold in precisely the area where most new jobs are found, in the small business sector. A recent Massachusetts Institute of Technology study shows that between 1969 and 1976, 60 percent of new jobs were created in firms with less than 20 employees; only 15 percent were created in firms with more than 500 employees. The new regulations could not be farther from the mark of equal employment opportunities.

The new regulations would also eliminate the principle of "aggregation" that the December 30 Carter regulations would have established. Aggregation is the requirement that the volume of a contractor's business with the federal government be measured by the sum of its business. Without aggregation, federal contractors with a large number of small federal contracts under $1 million will escape affirmative action requiremnts. Under this proposed change, more than 80 percent of the nation's universities, including major institutions such as the University of Michigan and the University of Southern California, will be judged as small businesses. They will not have to develop written affirmative action plans.

It is important to recognize here that affirmative action constitutes more than just an attitude. It is a series of logical steps to determine what hiring goals and time tables are proper. Without requirements to analyze the composition of the local work force, to conceive effective recruitment procedures, and to train management to prevent bias, affirmative action becomes a hollow shell. Thus, eliminating obligatory written affirmative action plans can only undermine the practice of affirmative action.

We must also consider the quality--not just the mere existence--of protections provided by the OFCCP regualtions. Fair, firm enforcement is essential if the Administration's committement to civil rights law is to mean anything. Yet the Administration has weakened and hindered the OFCCP enforcement provisions.

Just three examples:

(1) The proposed regulations will prohibit the government from "debarring" banks, that is, prevent the government from refusing federal deposit insurance contracts to banks that violate equal employment laws.

A large and important category of federal contractors, i.e., banks, have been found to be serious discriminators against women. In the Harris Bank and Trust case and other prominent cases, the courts and the Labor Department have upheld women's complaints of sex discrimination by banks. Under the proposed regulations, banks will not have to worry that discrimination might jeopardize their federal insurance. The law will remain nominally in place, but the chief incentive to comply will be gone.

(2) Sexual harassment regulations have been modified so that employers would no longer be responsible for sexual harassemnt by non-employees, even when the causes of harassment are within the employer's control. This is a slap at all women who face the undeniably serious problem of on-the-job sexual harassment. If employers can prevent the sexual harassment, they must, and the federal government must insure that they will do so. There is no burden of paperwork or overregulation here. There is only the principle of enforcing the law, of protecting women from sexual harassment.

(3) The proposed guidelines discourage third parties from filing discrimination complaints on behalf of descrimination victims. Such third-party complaints have proven enormously successful in redressing job discrimination in the past. The new regulations would require that in complaints the "alleged discriminatees be identified to the extent known." Identification would leave discriminated workers open to all kinds of subtle and unsubtle retaliation by their superiors. It would make workers think twice about seeking redress of their grievances. There is no evidence that third parties are pressing unfounded job discrimination

complaints and this weakening proposal has no place in any bona fide regulation.

In summary, ADA adamantly opposes the Administration's efforts to dismantle affirmative action. Affirmative action programs committed to specific goals and timetables are essential in overcoming the results of centuries of discrimination and segregation. I must state flat out that Mr. Reynold's spectre of "non-victims" getting "preferential treatment" is bunk. To prevent past and present prejudice from distorting fair employment procedures requires affirmative action. And that is giving women and minorities a shot at equal opportunity in the working world, not giving them unfair advantage.

If conscientiously implemented, affirmative action programs can help qualified women, blacks, and Hispanics gain a place in the job market that they would other wise be unjustly denied. Employers do not suffer when Hispanics gain a place in the job market that they would otherwise be unjustly denied. Nor do employers pay excessive costs as a result. A Business Rountable survey estimated that banks spend only one-hundredth of their gross revenues in establishing and operating their affirmative action programs. The OFCCP spends $1.26 in federal revenues to cover each of 40 million workers. These costs are modest, especially in light of the benefits to society of lower minority unemployment, of introducing more people to the job market, and of living up the ideal of equal opportunity.

Employment gains for women and minorities in the past decade cannot in any way be attributed to the altruism of business. Business has cooperated in affirmative action -- in some cases, admirably -- but it has always needed the guidance of federally mandated affirmative action programs. Until equal employment opportunities have been fully secured for women and minorities, the Americans for Democratic Action will support affirmative action programs.

press release

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FOR IMMEDIATE RELEASE
TUESDAY
December 8, 1981

ADA OPPOSES REAGAN ON WEAKENING AFFIRMATIVE ACTION

ADA Founder and noted civil rights attorney Joseph L. Rauh, Jr. today asked Congress to oppose Reagan Administration plans to weaken enforcement of affirmative action programs for women and minorities.

In testimony to the Senate Labor and Human Resources Committee Hearings on Executive Order 11246, Mr Rauh said, "Affirmative action programs committed to specific goals and time tables are essential in overcoming the results of centuries of disrimination and segregation."

As evidence of Administration anti-affirmative action plans, Rauh sited proposed regulation changes by the Office of Federal Contract Compliance Programs, limiting participation in mandatory affirmative action programs, changes in regulations preventing the government from debarring banks which violated equal employment laws, modifications weakening sexual harassment regualtions and proposed guidelines discouraging third party discrimination complaints.

Mr. Rauh noted that unemployment for minorities remains double the rate for whites and "the differentials between the earnings of men and women and whites and blacks remain a national scandal."

"The only effective way to pursue the goal of improving employment opportunitiies for minorities and women is through affirmative action."

The CHAIRMAN. Our next witness will be Dr. Walter Williams, professor of economics at George Mason University in Fairfax, Va.

Dr. Williams, we are happy to have you here.

Dr. WILLIAMS. Good morning.

The CHAIRMAN. Dr. Williams frequently testifies before this committee, and of course has been one of the eloquent spokesmen in America on the issue of affirmative action.

Dr. Williams.

STATEMENT OF DR. WALTER E. WILLIAMS, PROFESSOR OF ECONOMICS, GEORGE MASON UNIVERSITY, FAIRFAX, VA.

Dr. WILLIAMS. Thank you very much.

I am going to read very, very briefly the beginning of my testimony. Then I am going to add some things that were not written on the testimony.

First of all, I should say that affirmative action I believe is a euphemism for Government-backed racial quotas, and this offends every single principle, I believe, of individual liberty, individual accountability, and fairplay. Moreover, racial quotas promote and foster racial hostility; No. 2, are not politically viable over long periods; and, No. 3, lead us to ignore potentially more effective solutions to the problems that we seek to solve. Often, affirmative action—or quotas—harms its intended beneficiaries.

Black Americans have a history in the United States featured by gross abuses. There has been, and is, and probably always will be racial discrimination in the United States as well as the rest of the world. However, Government, far from being the solution to the problem, is very often the cause of the problems that blacks faced and still face in the United States.

Blacks were enslaved because Government did not do its job. After the Emancipation Proclamation, Government still did not do its job. With the Civil Rights Act of 1964, Government began to do its job; namely, insuring that the Constitution applied also to blacks.

Now lest I be misunderstood, let me make it very, very explicit by eliminating the abstract word "Government" as the villain in the piece of all this. This will allow me to focus more directly on the issues that racial quota policy causes us to ignore. You men, as Senators, win your way into office and retain that office essentially by promising some Americans that you will give them the fruits of another man's labor. You also win office by promising one group of Americans that they will be given a right or a privilege that will be denied other Americans.

Now when you do these things, I seriously doubt whether you are motivated by malice or contempt for the principles of individual liberty. In fact, I doubt whether you are always consciously aware of the implications and the impacts of many laws that you create. You probably think that you are acting in the public interest but whether you are motivated by good intentions or bad intentions, or whether you are unaware of the impact of what you do, does not have bearing on the ultimate effects of what you do.

The balance of my testimony will focus mostly on the effects of what you do, which spells disaster for many blacks.

The **Chairman**. Wait a minute, Walter. Are you saying for a minute here that us wonderful Senators and Congressmen love to take taxpayers' moneys and go out and give it away so that we can buy votes for those moneys?

Dr. **Williams**. Yes, I am.

The **Chairman**. You are?

Dr. **Williams**. Yes, I am. [Laughter.]

The **Chairman**. Well, that is what I thought you were saying, and I agree with you. As a matter of fact, that may be one reason why it is so difficult for President Reagan to balance the budget, isn't it?

Dr. **Williams**. That could be a problem. That spells disaster.

The **Chairman**. You know, this committee is a perfect illustration of that problem.

Dr. **Williams**. Yes.

Any Senator who supports the Davis-Bacon Act in effect supports a law which seriously hampers economic opportunities for black workers on federally financed construction projects. This is because the Davis-Bacon Act discriminates against the employment of nonunion labor on Federal construction projects. Most blacks, and I am also told Hispanics, in construction are nonunion workers. Furthermore, the Davis-Bacon Act discourages the use of apprentices and thereby works at cross-purposes to other Federal programs to increase black apprentices. Therefore, the Davis-Bacon Act discriminates against blacks whenever it applies.

In fact, much of the original intent of the Davis-Bacon Act was precisely that. That is, Congressman Allgood in 1931, testifying on behalf of the Davis-Bacon Act, said, and I quote: "That contractor over there has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country."

Now I think that controlling and setting artificially high wages has been recognized as a tool by racists everywhere in the world. For example, the South African newspaper, the Star, lamented: "Grabbing at loopholes in labor laws has reached the stage now where most new houses are built by almost entirely Africans. White builders are fast becoming something of the past." The secretary of this racist building union said: "There is no job reservation left in the building industry, and in the circumstances I support the rate for the job as the second best way of protecting our white artisans." I will give you the citation there.

Now the rate-for-the-job law in South Africa is just like our own Davis-Bacon Act in terms of its discriminatory effects. Your intentions behind your support for such a law differ from those of South African racists but the effect is the same in both places, that is, employment discrimination against less preferred and lower skilled workers.

Let me just continue for a second before I take a digression. It is not racial discrimination per se that denies blacks full employment opportunities in the construction industry, just for an example. It is laws like the Davis-Bacon Act and other Government labor laws that confer monopoly power on labor unions.

Now the moral issue, one ignored by those who criticize racial quotas, is that the critics of racial quotas implicitly assume that the economic game in the United States is being played fairly, and they implicitly assume that quotas introduce unfairness in that game. However, in many areas of economic life in the United States the economic game is rigged.

Now the question is, if we are to keep laws like the Davis-Bacon Act on the books, which systematically discriminate against blacks, then what are we going to do? Are we going to allow blacks to be denied employment opportunities? I say no. In the presence of the Davis-Bacon Act, a second-best solution may well have to be hard and fast racial quotas on all construction projects, on all Federal construction projects. I personally prefer the first best solution: That is, eliminate the Davis-Bacon Act and other forms of Government-sponsored restrictions and racial quotas.

Let me give you one personal story of the Davis-Bacon Act, one that I found not too long ago. In Michigan some black laborers were working on a construction project that was financed by the Federal Government. These laborers ran out of work to do as just menial laborers, and so the foreman had them nail down plywood. Now a man from FHA came and told the foreman that anybody who picks up a hammer on a project comes under another wage determination which was higher than the laborer's job, and the foreman had to fire these black laborers because they surely were not skilled enough to be able to pay the higher wage for nailing down plywood. That is an example of how a law like the Davis-Bacon Act discriminated against this employment opportunity.

Let me cite some others that perhaps are not within the bailiwick of the Federal Government but nonetheless they still deny equality of opportunity. I have done a study which is going to come out as a book next year, and it is entitled, "The State Against Blacks." I looked at the taxi industry across the United States. In my own city, Philadelphia, blacks own no more than 2 or 3 percent of the ownership of taxicabs in Philadelphia, while the population of blacks in Philadelphia is nearly 50 percent. Similarly, in New York blacks do not own many of the taxicabs in New York but lo and behold, if you come to Washington, D.C. you will see that blacks own 75 to 80 percent of the taxis in Washington, D.C.

How do you explain that? Can you explain it by saying that everywhere in the United States is a hotbed of racism except Washington, D.C., and that is why blacks do better in the taxicab industry in Washington, D.C.? That is just utter nonsense.

It turns out that maybe one of the explanatory variables is that in New York, in order to get a license to own and operate one taxi it costs you $65,000 in license fees. In Philadelphia it is $33,000. In Washington, D.C. it turns out to be $200 or less in order to get the right to drive a taxi. Now these licensing laws in the taxi industry and other areas systematically discriminate against anybody who does not have $65,000.

We talk about, again, discrimination in the construction industry. Many, many people see that there are not many blacks in the construction industry and they wonder. Well, that was not true back in the late 1800's. Blacks built various cities in the South and they were also supervised by black foremen. Blacks were plumbers, carpenters, stonemasons, and so forth.

Let me give you one example of one of the ways that blacks were eliminated from some of these trades. In the plumbers, for example, blacks were eliminated through licensing laws, that is, white plumbers getting together, using the coercive powers of the State to have licensing laws in plumbing and thereby driving blacks out. Blacks were 98 percent of the firemen on some railroads in the South; they were eliminated through a union activity and other kinds of licensing laws.

Now you might say, "Well, what is the role for Congress?" What is the role for you gentlemen in the Senate to do in these areas? Well, I would urge that Government, you men as elected representatives of this Government, start doing your jobs, and that is enforcing the Constitution of the United States. That is, it seems to be implied—though it is not strictly stated in the Constitution of the United States—that there is freedom of contract.

Freedom of contract has been an idea that has been held in contempt by officials everywhere. The "freedom of contract" idea lost its value during the 1930's when President Roosevelt, as a result of the New Deal, threatened to pack the Court and the Court went from a different reading of the fifth amendment, the due process clause of the fifth amendment, to another reading of that clause.

I assert that black people, all that they need is an equal opportunity under the law. That is, they do not need, I feel, quotas. They need an equal opportunity to compete with everybody else.

I just might make, in my final statement, a last comment on some of the nonsense that was being spoken by the last witness. He was talking about some kind effect test and looking at numbers. You know, the Government would bring its greatest suit, if it looked at the National Basketball Association, for gross discrimination against whites, Chinese, and Japanese. That is, 70 percent of the players in the NBA are black and just by looking at numbers, surely it does not suggest necessarily that there is discrimination. This gentleman, this last witness was kind of saying, "Well, maybe the white owners of the NBA were discriminating against white players." At least the statistics would lead you to that kind of conclusion.

The CHAIRMAN. I might add that that is certainly a bizarre example but if we have the effects test, we would have all kinds of bizarre examples like that. That is the problem and that is the point you are making.

Dr. WILLIAMS. Yes.

The CHAIRMAN. You see, all they want to do is make it easier to bring suits without caring whether they brand people as racists. You know, all discrimination is invidious, so to sit here and talk like—and I appreciate Mr. Rauh, he is an eloquent advocate for his position—but to sit here and talk like any discrimination is less than others is, it seems to me, invidious in and of itself. Therefore, I think that the Supreme Court decision using that term is wrong. The fact that you are making this point I think is important. That is what the effects test would lead to.

Dr. WILLIAMS. Yes.

The CHAIRMAN. That is what people do not think about when they want to throw out the whole system of Anglo-American jurisprudence requiring some proof—circumstantial or otherwise—of intent before you find people guilty of accused crimes or accused unlawful activity. I appreciate your point.

Let me ask you this: We are eager to come up with new ways of creating these equal employment opportunities that you have been talking about for women and minorities. That is one reason we are holding these hearings. Of course, that was the original intent of Executive Order 11246. Your frame of reference certainly opens up a new horizon for those of us who are serious about realizing our national goal of creating new opportunities but how best can we answer those who claim we must have stronger enforcement of affirmative action regulations to overcome past discriminations?

Dr. **Williams**. Well, the way I answer it, I am looking around this room and I see your average white person who might be 30 or 40 years old. Now I do not hold them accountable for the enslavement of my ancestors. That is, I think that there is a perverse sense of justice if one says that in order to compensate A, you have to punish individual B for what individual C did to individual D. I think one has to recognize that whenever you give someone a special advantage, you of necessity give someone else a special disadvantage. The question is, there is no basis, at least in my concept of justice, to punish somebody for things that they did not do. I believe in individual accountability.

However, I believe that the most important thing that Congress can do is make sure that the economic game is being played fairly in the United States, and all evidence shows where the economic game is being played fairly. When I say "fairly," means that when we do not erect artificial barriers to entry into various areas. We see that blacks do all right.

Some of the rigging of the economic game I believe is below contempt. Let me just give you one example of this: In my city of Philadelphia and in other cities they wish to get rid of street peddlers, people who are earning an honest living selling things on the street. Now a lot of the movement to get rid of the street peddlers are the owners of these large department stores like Bloomingdale's and Wanamaker's, and so forth and so on.

It seems to me to be contemptible; that is, the founders of these stores, they themselves started out as street peddlers and now they wish to say, "Now that we are on the economic boat, let's pull up the ladder so that nobody else gets on." I mean, we have many, many laws in a whole lot of areas that have the same kind of effects. We have licensing laws whereby those who are already in establish higher requirements for the job so as to keep other people out. Now they are not racially motivated; they want to keep anybody out, white or black, so that they can charge higher prices to all of us.

Therefore, the issue, I believe, is making sure the economic game is being played fairly, and one of the saddest things about coming to Congress is that it is the men in Congress that are charged with the welfare of all Americans that rig the economic game in behalf of some Americans at the expense of other Americans. I think that we need to move away from doing that.

One way to do it—I would help you write the amendment—what we need is an amendment to the U.S. Constitution guaranteeing every American economic freedom. Such an amendment might read: "No State or no individual has the right to interfere with voluntary exchange among adults." That is what I would like to see in the U.S. Constitution.

The CHAIRMAN. Thank you.

Senator Hawkins?

Senator HAWKINS. Thank you, Mr. Williams. It is a pleasure to see you testifying again today before our committee. I found your testimony on Davis-Bacon very interesting and helpful, and I appreciate your taking time to be with us again today. I did miss the beginning of your statement, and I apologize, but is it a fair summary for me to say that you believe that Government-imposed timetables and goals are actually harmful to the intended beneficiaries?

Dr. WILLIAMS. Oh, yes, by all means. Timetables and goals and the general program of quotas has some effects that are unanticipated. First of all, when you make it very difficult for an employer to fire somebody, you make him less willing to hire him.

Let's take the university, the arena I am more familiar with. Many, many universities, particularly high-powered universities, as a standard course of business they fire young professors at the end of 2 years. However, when it comes to blacks, because of affirmative action a lot of times they find it very difficult to fire blacks because of their fear of racial discrimination suits or, in the case of women, sexual discrimination suits. Therefore, they have a lower willingness to hire them in the first place.

Now the blacks who benefit from this kind of action are the blacks with proven track records; that is, blacks who have publications where the university does not have to worry about ever firing him and facing hundreds of thousands of dollars of discrimination suits. Therefore, what I am saying is that the black who benefits from the quota programs in the United States and all the laws surrounding a quota are the very blacks that do not need the help in the first place. They tend to be the cream of the crop. However, some black guy from the "University of Bit-Bat" who does not have any particular track record, he is penalized by it. All of the statistical evidence shows that as well.

Senator HAWKINS. Therefore, you believe that OFCCP's methods have created ill will and resentment against the people it was intended to help.

Dr. WILLIAMS. I believe so. I believe that we see it now. I said 10 years ago that affirmative action has heard its death knell, and the reason why is that a program is not likely to be politically viable if it creates perceived benefits for a minority at perceived high cost for the majority. Many, many white people around the United States are having misfortunes that does not have anything to do with blacks but they can feel some sense of comfort by blaming their misfortune in terms of employment on affirmative action. A lot of employers use affirmative action or goals and timetables as reasons to not hire people in the first place. They say, "Well, I cannot hire you. I have to hire a black." That may have nothing to do with it but it is an easier way of telling somebody that you cannot hire them.

Senator HAWKINS. Thank you very much.

The CHAIRMAN. Senator Quayle.

Senator **Quayle**. Thank you very much, Madam Chairwoman. I apologize for being late, and I would like to welcome our very distinguished witness, Dr. Williams.

I have followed you in the press accounts. I have not had the opportunity to meet you. Reading your testimony on page 2 you say: "Most blacks, and I am told Hispanics, in construction are nonunion workers." Before that, on Davis-Bacon, you say this is because the Davis-Bacon Act discriminates against the employment of nonunion labor in Federal construction projects. Do you have any statistics on that?

Dr. **Williams**. Well, the percentage of blacks in construction who are in the nonunion sector is around 78, 75 percent.

Senator **Quayle**. Seventy-eight percent of the Hispanics that are in the——

Dr. **Williams**. No, no, blacks.

Senator **Quayle** [continuing]. Blacks that are in the construction industry are in the nonunion sector?

Dr. **Williams**. Yes, that is correct.

Senator **Quayle**. OK. In conclusion you talk about a constitutional amendment guaranteeing all Americans economic freedom. Outside of a constitutional amendment, what steps, legislative steps, legislative remedies—you were talking about Davis-Bacon, affirmative action—what direction should this Congress be going to provide the economic freedom that you allude to, notwithstanding a constitutional amendment.

A constitutional amendment, as you well know, would be very difficult to achieve. I do not even want to get into whether we should or should not have the constitutional amendment that you talk about but maybe you could just outline some of the goals statutorily that we ought to be pursuing as a Congress.

Dr. **Williams**. Well, before I attempt to answer your question, let me state the way I look at the United States. I look at our country in terms of these issues the way a doctor might look at a patient with many, many kinds of diseases, and so he cannot receive a specific treatment. He has to prescribe a broad-spectrum antibiotic. We have the disease of reduced individual freedom in the United States. I do not think that it can be treated specifically because you would probably have to make a million different laws.

However, for specific steps it is just very simple. One is to repeal the Davis-Bacon Act. The Davis-Bacon Act has a very, very good basis for repeal because, number one, it is not very good government practice awarding bids to the lowest contractors. Bids go to higher contractors and then it has this perverse social effect and it contributes to all kinds of union work jurisdiction rules that drive up our costs in many, many projects.

Maybe another measure would be to repeal the minimum wage law, or failing that, allow a youth differential. Many, many blacks, receive a fraudulent education by the government schools in our cities; that is, they are graduated from these schools, many of them being 3 to 5 years behind the national norm. For many, many black youngsters going to these rotten schools, the only way that they can learn something that can make them more valuable employees in the future is to get it through the job market.

However, that particular avenue out of the ghetto is stifled by things like the minimum wage law which says to a young kid 14 or 15 or 16 years old, "Unless you have the skills to be able to produce $3.35 an hour worth of goods and services, you are not deserving of a job," because an employer is not going to hire one of these kids.

Now if we allow—if we do not do something to remedy the rotten education that blacks are receiving, you are going to be talking about affirmative action until the year 2050 or the year 3000 because if kids come out of school not being able to read and write well enough to fill out a job application, it is meaningless.

Therefore, in the area of schools what I would like——

Senator QUAYLE. Let me interrupt. Is that an educational problem?

Dr. WILLIAMS. Well, it is a monopoly problem. There is an education monopoly in the United States that has no standards of accountability. Now I would like, perhaps, Congress to introduce standards of accountability. One way that you can do this is to perhaps have a very, very handsome tuition tax credit, so that black parents in these ghettos whose kids go to these rotten schools would have some of the powers that you would have or I might have if we lived in the neighborhood and we did not like the schools our kids were going to. We could opt out and send them to the parochial schools or private schools which, according to the Coleman report, are doing a far better job in ghettos of educating black children.

Therefore, that is a major problem of blacks which also makes it difficult for us to tell about these complex problems. That is, if black kids graduate from high school, as do a large number, reading and writing at the seventh and eighth grade level, they cannot go downtown and cannot find a job. They are likely to call it racial discrimination. How can you tell?

I would like to see black kids be able to get the kind of competence, like in the NBA, I know that if some basketball team in the NBA did not have any blacks on their team I would be pretty sure that that is racial discrimination because there is no doubt that blacks are competent enough to play basketball very, very well, much better than whites, or Chinese or Japanese for that matter. [Laughter.]

However, blacks need to have the same kind of training in the public school system, and what we need to do is give them some kind of way to break the public education monopoly.

Senator QUAYLE. On affirmative action, it has been argued that we need strict enforcement of these rules and regulations to overcome past discrimination, that we need these laws, we need the role of the Federal Government because of the history of discrimination in this country. I think it is rather obvious if you so back historically. Nobody can deny that there has been discrimination, both with and without intent.

What is your response to that argument, that there has to be a Federal role, there has to be a role for affirmative action programs to overcome the historical pattern of discrimination in this country?

Dr. WILLIAMS. Well, my response is somewhat similar to that that I gave a little bit earlier, and that is, you do not look old enough to be responsible for the enslavement of my ancestors. Those people who were responsible are indeed dead, and those who were enslaved are indeed dead.

Now what I said, what we need to do, we cannot compensate. The point is that there is no free lunch in this world. That is, if you give me some kind of advantage, you of necessity give someone else a disadvantage. Now the moral question is, that person, a 25-year-old, 30-year-old, what has he done to have that disadvantage conferred on him? My attitude is that we have to ignore the past because we cannot change the past but we have to look to the future in the sense of making sure that the economic game is being played fairly, that everybody has equal opportunity, that people have equal access.

The ICC regulation of trucking, that is surely with Congress' purview. We need to deregulate that because that heavily discriminates against blacks and whites who do not have certain kinds of capital to get into the trucking business. There should only be three socially compelling requirements for one to be able to own and operate a truck: You need to ask the man, can you drive a truck; is that truck safe to drive; and, do you have insurance? Any other qualification for one to be able to operate a truck across the public highways of the United States amounts to subversion of the free market and subversion of equal opportunity.

Therefore, there are many, many laws that we need to look at and say, "Well, look at these vested interests. They come down to Congress. They have a lot of power, they have a lot of bucks, and they contribute to political campaigns. They may make life a little bit easier for you but in the fact of giving in to them, you hurt other people."

Senator **Quayle**. One final question on affirmative action and the rules and regulations that are presently there: Is there any role for affirmative action at the Federal level, the affirmative action program?

Dr. **Williams**. Well, in a system of free markets, in a system in the context of freedom in the United States there is no role for Government affirmative action in my opinion. However, in the context of rigged economic games there may indeed be a role for affirmative action.

As I suggested in my testimony, if we are going to keep a law on the books like the Davis-Bacon Act that systematically discriminates against blacks in construction, then I would argue that a second-best solution is indeed to have hard and fast racial quotas in construction employment. However, I would prefer the first-best solution, that is, get rid of the Davis-Bacon Act and also quotas.

Senator **Quayle**. However, facing reality and if we do have that situation, then with a limit there would be a role for the Federal Government in affirmative action programs? Is that a fair assumption? It is the second-best solution, not under the theoretical basis as you have outlined under free market enterprise——

Dr. **Williams**. Yes, in that specific area that I am talking about.

Senator **Quayle** [continuing]. I have just been informed that we have a number of other witnesses. I would like to go on with this. I have enjoyed your insight. You certainly do not lack ideas. I find it rather refreshing that you will come forward and speak from your heart, and I look forward to continue working with you on matters of mutual concern.

Dr. **Williams**. Thank you.

Senator **Quayle**. Thank you, Madam Chairwoman.

Senator **Hawkins** [acting chairwoman]. Thank you, Dr. Williams. You are excused.

Dr. **Williams**. Thank you.

[The prepared statement of Dr. Williams follows:]

WALTER E. WILLIAMS

TESTIMONY BEFORE THE U.S. SENATE

LABOR COMMITTEE HEARINGS DECEMBER 8, 1981

Gentlemen. Affirmative action, a euphemism for government backed racial quotas, offends every single principle of individual liberty, individual accountability and fair play. Moreover, racial quotas: (1) promote and foster racial hostility; (2) are not politically viable over long periods; and (3) lead us to ignore potentially more effective solutions to the problems that we seek to solve and (4) often harm its intended beneficiaries.

Black Americans have a history in the United States featured by gross abuses. There has been, is, and probably always will be, racial discrimination in the United States as well as the rest of the world. But government, far from being the solution, is very often the cause of the problems that blacks have faced, and still face in the United States. Blacks were enslaved because government did not do its job. After the Emancipation Proclamation, the government still did not do its job. With the Civil Rights Act of 1964, government began to do its job—namely, insuring that the Constitution also applied to blacks.

Lest I be misunderstood, let me be a little more explicit by eliminating the abstract word government. This will allow me to focus more directly on the issues that racial quota policy causes us to ignore. You men, as Senators, win your way into office, and retain that office, essentially by promising some Americans that you will give them the fruits of another American's labor. And you win office by promising one group of Americans that they will be given a right or a privilege denied to other Americans.

When you do these things, I seriously doubt that you are motivated by malice or contempt for the principles of individual freedom. In fact, I doubt whether you are always consciously aware of the implications and impact of many of the laws you create. You probably think that you are acting in the public interest. But whether you are motivated by good or bad intentions or whether you are aware of the impact of what you do or not has no bearing on the ultimate effects of what you do. The balance of my testimony will focus mostly on the effects of what you do which spells disaster for many blacks.

Any Senator who supports the Davis-Bacon Act in effect supports a law which seriously hampers economic opportunity for black workers on federally financed construction projects. This is because the Davis-Bacon Act discriminates against the employment of non-union labor on federal construction projects. Most blacks, and I am told Hispanics, in construction are non-union workers. Furthermore, the Davis-Bacon Act discourages the use of apprentices and thereby works at cross-purposes to other federal programs to increase black apprentices. Therefore, the Davis-Bacon Act discriminates against blacks wherever it applies.

In fact, much of the original intent of the Davis-Bacon Act was precisely that. Congressman Allgood, in 1931 testifying on its behalf said, "That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country (Congressional Record, House, 71st Congress, 1931, p. 6518).

Controlling and setting artificially high wages has been recognized as a tool by racists everywhere. The South African newspaper, The Star, lamented "Grabbing at loop holes in the labour laws has reached the stage now where most new houses are built almost entirely by Africans. White builders are fast becoming something of the past." The secretary of the racist Building Workers Union said, "There is no job reservation left in the building industry, and in the circumstances I support the rate for the job as the second best way of protecting our white artisans." (G.M.E. Leistner and W.J. Breytenbach, The Black Worker, p. 28).

The rate-for-the-job law of South Africa is just like our Davis-Bacon Act in terms of its discriminatory effects. Your intentions behind your support for such a law differs from those of South African racists, but the effect is the same in both places--employment discrimination against less-preferred and lower skilled workers.

It is not racial discrimination, per se, that denies blacks full employment opportunity in the construction industry, it's laws like the Davis-Bacon Act and other government labor laws that confer monopoly power on labor unions. Now the moral issue--one ignored by those who criticize racial quotas. The critics of racial quotas implicitly assume that the economic game is being played fairly and that quotas introduce unfairness. But in many areas of economic life, the game is rigged. Now, if we are to keep laws like the Davis-Bacon Act on the books which systematically discriminate against blacks, what then are we to do? Allow blacks to be denied employment opportunities? No! In the presence of the Davis-Bacon Act, a second best solution may well be to have hard and fast quotas on all federal construction projects. I personally prefer the first best solution: eliminate the Davis-Bacon Act and other forms of government sponsored restrictions and racial quotas.

Let me cite another example just to demonstrate the principle as opposed to singling out the Davis-Bacon Act. While I was doing research for my forthcoming book, The State Against Blacks, I came across the case of a black trucker in Omaha, Nebraska. Mr. Ward Smith submitted the low bid on a government contract to ship the household goods of Offutt Air Force base personnel. The contract was instead awarded to another trucking company which had bid $80,000 more than Mr. Smith. Mr. Smith was denied the contract because he did not have ICC authority to ship goods across state lines. Mr. Smith lost and the American tax payer lost. You might say, "Why didn't Mr. Smith apply to the ICC for authority?" Well Mr. Frank Pierson of Allstates Moving Company, a black-owned firm, just recently received broad national authority after applying to the ICC since 1950. In the process, he spent over $350,000 in legal fees for the right to run trucks on the public highways.

Many people seeing few blacks with federal contracts will say quotas and setasides are needed. Mr. Ward Smith did not need a quota; he needed the government, acting in behalf of powerful interests, off his back. But the quota approach ignores this monopoly problem; a monopoly set up for the Teamsters and big trucking companies. But there are white truckers like Mr. Smith. They cannot get ICC authority either. Now how do you think a white trucker, who can't get ICC authority, who differs from Ward Smith only by color, feels when a quota is set up for Mr. Smith? What does it do for racial relations? Very often you men in Congress set the basis for conflict and go unseen as the villian.

These are only two examples of broad contempt for individual freedoms, reinforced by Congress, that reduces opportunities. There are many others at the state and local level in the form of occupational and business licensing. There is a basis for the regulation of trucks, but there are only three socially compelling regulatory requirements to operate trucks along the public highways. The regulatory agency should get an affirmative answer from the following questions: (1) Can you drive a truck? (2) Is your truck safe to drive? and (3) Is your truck adequately insured? All other entry conditions amounts to Congress granting favors.

I have personal acquaintance with other laws you created that doom many blacks. When I was a kid growing up in the slums of North Philadelphia, I had many jobs. I swept supermarket floors, shoveled snow off train platforms, bussed tables and washed dishes at Horn & Hardart resturant. I learned work attitudes and learned how to get a job. I visit my old neighborhood once and a while. Those kids who live there now do not have the chances to escape the ghetto that I had way back in the late 40's and early 50's. You men have eliminated their opportunities; for example, kids can't sweep out supermarkets. The Retail Clerks Union is not interested in seeing a kid sweep out a supermarket for $20 when their member can get $100. You have given them the right to confront the supermarket owner with the proposition: either you hire our members or you get no labor at all and a 14 year old kid cannot get into the union.

Another broad area of opportunity denial is the public education monopoly in America. Black children are having future career opportunities snuffed out on a daily basis in most large American cities. They often graduate from high school reading, writing and doing math at the sixth grade level. If this continues, it means that racial quotas in college adminssions and jobs will be a permanent feature for blacks. I believe that one of the most effective things that you can do to remedy this gross fraud in education is to support a voucher system or a generous tuition tax credit.

Gentlemen. My testimony has given just a few examples of opportunities that you have destroyed for America's most unfortunate citizens, black as well as white. Affirmative action or quotas will not replace these lost opportunities. Economic freedom will. I am not naive. I know that if you support economic freedom, you will pay a political price. If you vote against the Davis-Bacon Act, you will have union contractors and union workers against you. If you vote for freedom in the trucking industry, you will have the Teamsters and the American Trucking Association to contend with. If you support tuition tax credits, you have the teacher's unions against you. I know that fighting these groups may require a level of bravery and commitment to freedom seldom found in one man. Therefore, my recommendation is that you write a constitutional amendment guaranteeing all Americans economic freedom. This will provide economic opportunity. Should you opt for this course of action, I offer you my assistance in writing such an amendment. Thank you.

Senator HAWKINS. The next witness will be Dr. Nathan Glazer, professor of the Graduate School of Sociology and Education at Harvard University. You are welcome.

STATEMENT OF DR. NATHAN GLAZER. PROFESSOR, GRADUATE SCHOOL OF SOCIOLOGY AND EDUCATION, HARVARD UNIVERSITY

Dr. GLAZER. Thank you, Senator Hawkins.

In view of how late it is, and in view of the fact that while I wrote a statement, I did not have a chance to have it retyped and distributed, I will speak extremely briefly and respond to any questions that are of interest. I will only refer to material that has not come up before.

I want to comment first on the changes in the economic position of blacks in the past 15 or 20 years and the possible role of affirmative action in that change. As have the other speakers, I will be concentrating not on the affirmative action called for by the Executive order—which tends, I think, to be on the whole unobjectionable—but on the affirmative action that has been required through additional regulations, particularly the goals and timetables approach, the creation of affected classes or protected classes, and the requirements that Government contractors try to reach certain figures in employment of the affected classes in each employment category.

It is in that context that I think it is interesting to look at the economic change in the position of our largest minority and consider what the effect of affirmative action might have been on that, what in a practical way we have been getting from it, and what we might be giving up if we give up some parts of that approach.

There is an interesting paradox in these figures. On the one hand there has been great economic progress but progress limited, I would say, to those who have jobs, who are a very substantial part of the black population even with unemployment at 15 or 16 percent. Interestingly enough—and I think it would be very important, perhaps, to look into this further—recent studies show that if you equate blacks with whites on such key factors as education, experience, area of the country, blacks are now earning as much as whites.

Since that now sounds like a sensational statement, let me explain what it means: If blacks had roughly the same education as whites, the same years of experience, if more of them lived in the higher-paying parts of the country like the West and the North and fewer of them lived in the South, there would be no particular difference or substantial difference in earnings. I say this on the basis of studies by the distinguished sociologist and demographer Reynolds Farley, of the University of Michigan, and I think most people would not dispute it.

If you had done the same exercise 20 years ago, you would have found a huge difference. You would have found that even if blacks were of the same education, experience, region, and so on, there would still be a great difference to be explained, a difference owing to discrimination. In other words, there seems to be little in statistical studies of blacks against whites left to explain as a result of discrimination. I think that is a very important finding. It is certainly worth this committee reviewing it, looking into it, and trying to understand what it means.

On the other hand, I have been talking only of employed blacks. There are two great areas of problems: unemployment, which is twice as great for blacks and more than twice as great for black youth than for white, and also the presence of very large numbers of female-headed families whose income inevitably must be lower than that of male-headed families.

Another way of demonstrating this change is to point out that if you have families headed by black men of the same education as that of white men, you now have a rough equivalence in income. In other words, there has been great progress in the area of employed blacks, and I speak of blacks as the largest minority. There has been no progress in the area of reducing youth unemployment or of affecting the very large proportion of the black population, the female-headed households, who inevitably cannot gain a substantial income from the labor market and who are mostly dependent on transfer payments, AFDC, and so on.

Now I think it is interesting to ask, What has affirmative action had to do with this change? Undoubtedly affirmative action has had some effect on the substantial change I have pointed out in the area of employment, in the relative equivalence of rewards for education and experience that we now see for blacks and for whites.

I find it very hard to think that affirmative action, this enormous enterprise we are engaged in of goals, timetables, reviews, paperwork, and so on, will do much about what are the really large and substantial problems of the black community, that is, high levels of youth unemployment, high proportions of female-headed families. As has been pointed out by other witnesses here, regardless of affirmative action, regardless of the pressures of the goals and timetables approach, the employer looks for the best-qualified person that he can hire. Even if he is hiring under quota, he looks for the best-qualified person in the quota he must fulfill, and that best qualified means that he very rarely gets to this large pool of black youth who have emerged with poor education, poor skills, and who do not look to him like good bets.

I present this because I think that any arguments of principle—and I have arguments of principle on the approach that afirmative action takes in goals and timetables, and I have argued them in my book Affirmative Discrimination and elsewhere—have to in effect be modified by practical considerations. If it were the case that the great change we have seen, at least in the area of rewards for employment to blacks, was owing to goals and timetables, and if it were the case that we might expect other great changes in terms of reducing unemployment of black youths, then I would support this approach.

However, I do not think these changes are the result of the goals and timetables approach. I think at least as important is the Civil Rights Act of 1964 and the enforcement of antidiscrimination laws, at least as important is the very substantial changes in attitudes that we have seen in this country, such that discriminatory attitudes are not only less respectable but simply less evident and less in existence than they were. At least as important is that there has been a substantial change over the past 15 years, an enormous change, in the average level of educational achievement among blacks.

It is for these reasons that I think the second set of considerations that we have to take into account in considering the goals and timetables approach affirmative action, moral considerations, becomes important. I believe it is repugnant to the American people to make distinctions by race and ethnic background, with the requirement that some groups be favored above others.

There is no point getting into semantics over whether affirmative action requires favoring; it does. I believe in favoring if this is done voluntarily. I have sat on search committees in my university and in others. I have sat on appointment committees, and again and again we have been affected by the consideration that we want minority students, we want minority faculty, and we will make special efforts to look for them and to do something to get them admitted and employed.

I will conclude by saying the major economic issues that we face in our largest minority group will not be affected much by affirmative action requirements and the enormous burden they impose on employers.

I would like, however, having made a brief summary of my prepared statement which I will send to the committee, to comment on two points that have been raised in previous testimony. One, on the effects test, effects versus intent: I do not know how the legal issue could or should be tackled but I think it is important to realize that when we say that people intend the effects that occur, there are a lot of different effects that they intend and that are taking place.

They know when they give a test for minimal ability to read and write to a policeman, that one of the effects they will get, and thus intend, is a policeman who can read and write. It is true there is another effect, that there will be a lesser percentage of minorities coming through the test, but I think we have to realize that one very important effect we intend hope for and thus may be said to "intend" in setting requirements for employment is a higher degree of efficiency.

I think in this respect that it is most unfortunate that the present administration accepted—and I know it is a complicated issue—the settlement on the PACE examination. I think most Americans want Government employees who can read, write, calculate, and in effect be more efficient Government employees.

A final point: It was also said voluntary compliance has never worked. I would like to point out that one of the biggest changes we have seen in our society in recent years has occurred because of purely voluntary measures. I refer to the huge increase in the proportion of women students in medical schools and law schools. This used to be of the order of 5 percent; it is now of the order of 30 or 35 percent.

This did not occur because the Government brought suits, because Government imposed quotas, because Government imposed goals and timetables. It occurred because of many other changes: Changes in the number of qualified women who applied to these institutions; changes in the attitudes of these institutions as to what sort of students they should have; through pressures from various groups; and so on. However, Government, I would point out, despite the fact that there is an antidiscrimination law affecting educational institutions, had nothing to do with this enormous change.

There are certainly cases where what we might call voluntary actions, based on changes in attitude and helped along of course by changes in legislation, and by legislation which tells you what is right and what is wrong—there are certainly cases where this kind of voluntary action has worked and produced substantial changes.

Senator **HAWKINS**. Thank you, Dr. Glazer.

Why has there been a change in attitude, in your opinion, on the part of Americans for the better regarding this subject?

Dr. **GLAZER**. Well, I think the laws we are talking about—though we actually are talking about Government regulations, we are also talking about the Civil Rights Act—have reflected the change but have also encouraged the change. A law is a way of saying what it is we all think is right and what it is we all believe.

I think there have been many reasons for the change. I think World War II had a great deal to do with it in the sense that we were fighting a war against a racist enemy. I think the organization of black opposition to discrimination and to prejudice and to unequal treatment had a great deal to do with it. I think the expansion of education of the American people had something to do with it but I do think it is happening.

Senator **HAWKINS**. We appreciate your coming, and would like to have the opportunity to read your testimony after you submit it and submit questions to you for a more complete response for the record, if you do not mind.

Dr. **GLAZER**. All right. Thank you.

Senator **HAWKINS**. Thank you very much, Dr. Glazer.

[The prepared statement of Dr. Glazer follows:]

STATEMENT ON AFFIRMATIVE ACTION
BEFORE THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES,
DECEMBER 8, 1981.

By
Nathan Glazer

In discussing affirmative action programs, there are two major kinds of considerations: One is considerations of principle. What approaches are consistent with principles of fair behavior to which we are all committed? What approaches give the greatest hope of achieving a society of equal treatment without consideration of race, ethnic background, or sex?

A second set of considerations is pragmatic. What has been the effect of affirmative action on the economic condition of blacks? I will consider practical questions first, and I concentrate specifically on the impact of affirmative action on the economic condition of blacks. It is the persecution of and discrimination against blacks, their fight against these conditions, and the support of other Americans committed to equal treatment, that led to the Civil Rights Acts of 1964, and the Executive Order calling for affirmative action. It is true other groups are the specific beneficiaries of affirmative action, but blacks remain by far the largest minority, and also are the minority intended to be the primary beneficiaries of these measures. Statistics show a substantial improvement in the economic position of blacks since the middle 1960's in particular, but that condition presents a paradox: Insofar as blacks are employed, they are now rewarded roughly in the same way that whites are. That is, they earn in accordance with their education, their experience, the region of the country they are working in, the occupations they work in. I base this judgment on careful work by the demographer Reynolds Farley, of the University of Michigan, who demonstrates that whereas blacks in the same position as whites, men and women, earned much less than comparable whites in 1960, they earned as much in 1979. The real differences between the earnings of black men and women and white men and women are today owing to lesser education, lesser experience, concentration in the low-wage-paying South, and other factors that do not evidence discrimination today, though they are in part owing to discrimination in the past. The black who works does as well as the white, taking understandable differences in education, experience, region and other factors into account.

The other side of the coin, however, is that much higher proportions of blacks are unemployed; and that much higher proportions of blacks are living in female-headed households in which income comes on the whole not as wages but as transfer payments, and is much less than the income of male-headed households. The paradox, which has been evident through most of the 1970's, is that insofar as black families are male-headed, they have improved their position greatly, and are not doing particularly worse than white, and much of the differences can be explained by understandable and non-discriminatory features.

One must ask, what is the effect of affirmative action on the positive side of the ledger; what is its effect, or potential effect, on the negative side?

Certainly affirmative action requirements have had some effect on the substantial progress made by blacks in the past twenty years. But one must point out that a great deal of this progress was made in the 1960's, before affirmative action requirements were well developed. And it is in principle difficult to distinguish the effect of the Congressional ban on discrimination, enforced by the EEOC, and the Executive requirement for affirmative action, enforced by the OFCCP. There is substantial evidence in public opinion polls and elsewhere of an enormous change in American attitudes on race, a change both evidenced in the passage of the Civil Rights Act, and further spurred by the wide-reaching provisions of that and subsequent acts. These are matters of faith: but I believe that blacks are today treated, in broad reaches of the economy, in consideration for employment and promotion, on the whole, as whites are. Formal qualifications and evidences of effectiveness are rated in roughly the same way. I have seen little evidence that argues otherwise.

But when we speak of the black condition in this country, we inevitably must focus on the large numbers of the unemployed, in particular the huge concentrations of unemployed black youth, and the very high proportion of female-headed families, whose adult members either cannot work, or can get work at only very low wages, owing to poor and underdeveloped skills. These families have in large measure been created by teen-age mothers who have dropped out of school or have not had regular jobs. What role can affirmative action play in improving the condition of both groups? The employer under affirmative action or requirements of non-discrimination still seeks the most reliable employee he can -- he prefers the high school graduate to the non-graduate, an applicant who can read, spell, and calculate to one who cannot, an applicant who looks as if he or she will show up on time and work regularly to one who suggests unreliability, and the like. Clearly the most valuable thing one can do for unemployed black youth is to improve their skills in all these areas. What can be done for the other great black social problem, the female-headed family, is another matter, and has reduced most analysts of this issue to silence.

The general point -- that the improvement of skills and capacities is more important for the improvement of the black condition than are the requirements of affirmative action to reach certain specified numbers in employment and promotion -- becomes even sharper in given areas of specialization. Thus, in the case of college teaching, the problem is clearly that the numbers of blacks earning Ph.D.'s, in arts and sciences fields in general, in the sciences in particular, is so small that no substantial improvement can be expected until more blacks undertake studies leading to the Ph.D. The same is true in fields based on mathematics and science: The issue there is to encourage young blacks to take mathematics and science early, something our public schools are just not very good at doing.

Affirmative action has had some effect in whatever improvement we have seen in earnings and occupation of blacks; its effects, whatever, they have been, on the employment prospects of black youths without adequate education or skills, and on the formation of female-headed families, whatever they may have been, have not been sufficient to prevent these two problems from looming larger today than they did before the institution of affirmative action programs. This fact alone should suggest to us that other approaches are necessary and may be more effective.

I said at the beginning there is a second set of considerations that must affect our judgment of affirmative action, and these are considerations of principle. It is repugnant to the American people to make distinctions by race and ethnic background, with the requirements that some groups be favored above others. There is no point getting into semantics over whether affirmative action requires "favoring." Having served on search and appointment committees, and on admissions committees, this is specifically what we do -- we give greater consideration to some people because of their race and ethnic background than to others.

Nor does this bother me. I believe that many business organizations, universities and colleges, government agencies and services, would be well advised to take race and ethnic background and sex into account for a variety of reasons for some of their employees: Either because they must deal with members of minority communities and people from these groups might be considered better qualified for these tasks, or for reasons of public relations, or simply because many employers feel personally they wish to do something to make up for a past of discrimination. I hope whatever we do about voluntary affirmative action will make it possible for such forms of voluntary affirmative action to continue.

The real question is not whether President Reagan was well advised to appoint a woman to the Supreme Court and a black to his Cabinet, but whether government agencies should saddle every contractor in the country with complex requirements designed to achieve some statistical target for minorities and women in the work force. I do not believe the modest practical advantages of gains in the economic condition of our most depressed groups justify transgressing the principle of equal treatment, going against the deeply held wishes of the American people? I do not think so.

There are finally pragmatic political considerations that speak against affirmative action. We now have affirmative action requirements for a range of groups, some of which (Cubans) have not been discriminated against, some of which (Asians) are not presently discriminated against. The enforcement of affirmative action, intended originally for, and in response to the condition of blacks, is now complicated by the need to enforce affirmative action for women, which raises to my mind very different problems. We must also consider the future, and whether we will not be saddled for a longer time than we wish with these complex requirements of different degrees of preference for different groups, leading to divisiveness and anger among those not so favored.

My own conclusion is that we would be better off without affirmative action goals and timetable requirements, with their heavy costs, their requirements of differential treatment, their uncertain benefits even for intended beneficiaries. We must enforce anti-discrimination laws firmly. But we should not translate them into requirements of ever more refined statistical requirements as to the ethnic and racial make-up of labor forces. There are alternatives to affirmative action programs that will do more for blacks, and more for society, and they are basically programs that improve education and abilities.

Senator HAWKINS. The next witness will be Jose Cano, who represents the American G.I. Forum, Dallas, Tex.

Welcome.

STATEMENT OF JOSE CANO, CHAIRMAN, AMERICAN G.I. FORUM OF THE UNITED STATES, DALLAS, TEX.

Mr. CANO. Good morning, Senator.

I thank you for the opportunity to come and present my testimony before you. I prepared the testimony with input from individuals from the public and private sector and, of course, the position of the American G.I. Forum. Rather than go through the lengthy testimony that I have and read to you what we have prepared, which we think is a very practical approach for affirmative action, let me say for the record that I do not believe in voluntary affirmative action. I think the Government role has still a lot of fulfillments that it has to achieve before we can say that voluntary affirmative action can take place.

However, we concur with the feeling of most of the people that have provided testimony before me, and when I was here on May 21, that the Office of Federal Contract Compliance is extremely bureaucratic, and that there is a need for a strong streamlining of the policies currently in force.

Therefore, with that we are going to provide testimony in various areas, mainly away from some of the traditional type of concepts that have been used in affirmative action, and that is, directing hopefully some legislation that would be focusing on a training and recruitment approach or incentives for corporations along with this type of affirmative action. Also, we do believe we have a very practical approach to present to this committee on goals, which we still believe is a very strong measure and tool for anybody in affirmative action, whether you are establishing a goal on your sales or establishing a goal on your own life. Therefore, we believe that goals not translated into quotas are very essential to affirmative action.

Then, of course, we still believe that there is a reporting procedure. One of the things that I keep hearing before this committee is the intent versus the effect. Regardless of whether anybody intended to discriminate, if the effect is a discriminatory effect then there has to be a measurement. We are presenting before this committee a procedure that is already existent in various institutions that measures the selection factors of individuals that are available on selection lists. Then, of course, again I would reemphasize the incentives.

In the incentive area—which we believe is the strong point of our testimony—and in deliberations with various corporate officials, they have really grabbed onto the idea and like it. I do not know what this committee will think. However, one of the strong incentives for getting corporations to comply with affirmative action, in our opinion, would be to provide training programs where you develop that vast resource of individuals or humans in this country, minority and females, and to allow this institution providing the moneys for the training programs some tax breaks up to about 50 percent of the real dollars spent on any type of training program.

Currently, the Kemp-Garcia amendment allows for a 5-percent tax break for any type of money spent for training programs or recruitment purposes, and we believe this is unrealistic. The CETA legislation allowed for 15 percent, and of course that was not enough of a tax break for the corporations to really bite into it. Therefore, we are recommending in the incentive area that this committee look very hard at a tax break for moneys or real dollars spent in any type of program alloted. Of course, we profess that the moneys be alloted to the community-based organizations that have the constant contact with the skilled and unskilled resources that are available.

In that context, then, we have the training of the folks that do not possess the skills. Then of course we also profess that, especially in this time of high unemployment, that there is a large group of skilled people that already possess a skill, so therefore there is a need for an identification process for attraction and recruitment of these individuals; therefore, the affirmative action.

Now I heard a gentleman a while ago that sat here and philosophized quite a bit on how he felt this country ought to operate, Mr. Williams. It seemed to me that he was using a scatter gun approach and going in different directions. He did make a very noteworthy testimony that this has been a very costly program on the employer while there have been small benefits for the employee but he failed to carry it one step further and emphasize that the reason there has been a failure is because there has been no enforcement of the program, as I said in my previous testimony. Any law without enforcement has been very ineffective, and I do not agree with his premise.

Along with that, we are also then proposing a simple formula for goals and timetables that has already been instituted in various areas, both in the public and private sector, and that is simply taking a measurement of an industry's percentage of minorities and women broken down by categories and by States. Then what happens or what transpires is that any industry that falls below that mean average of course has to catch up with the industry's percentage, or anybody that falls above would not have to have any goals, but anybody below that mean average of the industry would have to establish goals.

For example, the banking industry if you were to take it for the State of Texas, and combine all the banking industry in an outline by job skills and by State and then by minorities and women, the percentage for each of those categories, then you would more than likely have 50 percent that fell below and 50 percent that fell above that line. Then, of course, goals would be established for those that were below. Therefore, you are establishing competition among the industry which we think is a very practical approach. We call it the industry baseline percentage concept.

We will be glad to serve any committee to assist in this area. It is a concept where the industry would have very minimal paperwork, most of the data base being provided by the OFCCP, which would be simple to replace. Of course, the ultimate goal would be the labor force statistic which we think is going to be achieved, I do not know how many years from now but hopefully some time in the foreseeable future.

Then, of course, we still believe that as far as the intent versus the effect, the only way to measure that is for the companies to maintain recordkeeping. We are professing a very simple recordkeeping process, and that is to measure the number of job opportunities, the number of hires and promotions by race and sex, the applicants that applied under each of the selection lists, and the documentation of good faith efforts including significant affirmative action programs, which would be the training and recruitment programs.

Therefore, simply what you would have is a picture of how many applicants were presented for the job, how many were from a minority background, and then what the selection factor was. From a series of about 25 or 30 selections, depending on the size of the company, you could really tell whether there was intent to discriminate or what the effect was, if that was what you wanted to measure, with a very simplistic approach. In fact, being from a background of affirmative action myself, being an employee in the area, I have a system instituted to measure that, that can readily outline what the selection factor is of any manager.

Therefore, what we are proposing here is a streamlining of the current policies. In fact, we have reviewed this with various corporations throughout the country and they seem to think that it is in line with what they would like to see.

We also still believe that the reason that the law failed, or Executive Order 11246 has not had the type of success that it should have had, is because of enforcement. Again, even in the public sector, in the Federal Government, that has been the case. I know of very few people that have gone through the cumbersome process of debarment of any industry and where debarment has actually taken place. I know most of the enforcement coming out of the OFCCP has been letters of reprimand, really with no success at all in enforcing any laws.

Therefore, we are getting away from the debarment process, even though it has to be maintained in the background, ultimately, because that is the only thing that we could see that the Federal Government would apply. However, we are professing the use of back pay. I know that some people throughout the country have had a difficult time with back pay but, in the process that we outlined of the appplicants and the nonselection of those applicants over a period of time, then you have already identified a really affected class that should be the beneficiaries of back pay in order to correct their nonselection.

That is our simple premise. It is more detailed in the report. We actually have the formats and all the necessary data that we could provide to this committee. I have also made myself available, if the committee chooses, to help in the future to design this program. Let me again reemphasize that there were a lot of people who have been involved in this area for a long time, that were responsible for generating the thinking process in this concept.

At this point I will be glad to answer any questions. I know I went it over superficially but you have a copy of my testimony that is more detailed with the mechanics of how all this would work.

Senator HAWKINS. Yes, we appreciate your testimony very much. Your comments are pertinent, not only to the subject matter of today's hearings but to the committee's efforts in establishing an employment and training program to replace CETA when it expires next year. Many of the issues that you have raised today have been raised by the employment subcommittee in its hearings.

We found the private sector to be very open to training programs designed to give employment opportunities to minorities and women. We also found that they have been very innovative in creating programs that bridged the gap between available jobs and the skills of the unemployed. Don't you feel that employers would be open to taking a more active role in affirmative action programs if the Government's role was changed to a cooperative role rather than a punitive one?

Mr. CANO. Well, there is no doubt that—in fact, I said this in my original testimony—that technical assistance should be a direction of the Office of Federal Contract Compliance. In that other area, however, the Office of Federal Contract Compliance should maintain a role. We do not profess the complete elimination of the enforcement powers of the OFCCP because I do not think anyone on this committee can stand here and tell me that there will be a case of pure nondiscrimination that will exist in the future. Therefore, while we are saying that we foresee a tremendous minimizing of the role of the OFCCP, I still think that they should be a strong part of affirmative action.

Senator HAWKINS. We appreciate your testifying and the committee will submit a list of questions to you that you could answer for the record, if you do not mind. Thank you very much.

Mr. CANO. Thank you.

[The prepared statement of Mr. Cano follows:]

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DISTINGUISHED MEMBERS OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES —— ON AFFIRMATIVE ACTION AND EQUAL PROTECTION. I AM JOSE CANO, NATIONAL CHAIRMAN OF THE AMERICAN G.I. FORUM OF THE U.S. MY THANKS TO THE HONORABLE ORRIN HATCH FOR INVITING ME TO SPEAK TO YOU TODAY. THE AMERICAN G.I. FORUM IS A VETERAN FAMILY ORGANIZATION WITH MEMBERSHIP IN 37 STATES AND 500 CHAPTERS THROUGHOUT OUR NATION. OUR MEMBERSHIP IS COMPOSED PRIMARILY OF HISPANIC VETERANS THAT HAVE SERVED OUR COUNTRY HEROICALLY IN PAST WARS AND CONFLICTS. THEREFORE, THE AMERICAN G.I. FORUM IS VITALLY INTERESTED IN EQUALITY OF OPPORTUNITY IN EMPLOYMENT BY FEDERAL CONTRACTORS AND SUB-CONTRACTORS SINCE WE HAVE HAD MORE THAN OUR SHARE OF OPPORTUNITY AS WAR CASUALTIES. MORE SPECIFICALLY, 21% OF ALL VIETNAM CASUALTIES WERE HISPANICS.

ON THE TESTIMONY THAT I PRESENTED BEFORE THIS COMMITTEE ON JULY 29, 1981, I OUTLINED THE GENERAL PHILOSOPHY OF THE ORGANIZATION ON ELIMINATING OR REDUCING RED TAPE WITHIN THE OFFICE OF FEDERAL CONTRACT COMPLIANCE, HOWEVER, WITH AN ABSENSE OF SPECIFIC RECOMMENDATIONS. TODAY, I SUBMIT FOR YOUR CONSIDERATION A MORE SPECIFIC CONCEPT THAT SHOULD BE PALATABLE TO GOVERNMENT CONTRACTORS AND SUB-CONTRACTORS, GOVERNMENT COMPLIANCE AGENCIES, AND THE HISPANIC COMMUNITY. I AM CONVINCED THAT OUR RECOMMENDATIONS WILL STREAMLINE THE PRESENT REGULATIONS, YET PRODUCE A COST EFFECTIVE, RESULTS ORIENTED PROGRAM.

THE POSITION OF THE AMERICAN G.I. FORUM WAS DEVELOPED WITH INPUT FROM OTHER COMMUNITY BASED ORGANIZATIONS AND KNOWLEDGEABLE REPRESENTATIVES OF BOTH PUBLIC AND PRIVATE SECTOR AFFIRMATIVE ACTION PROGRAMS. WE HAVE MODIFIED OUR APPROACH CONSISTANT WITH CURRENT POLICY OF PERMITTING THE PRIVATE SECTOR TO ASSUME MORE RESPONSIBILITY FOR EQUAL OPPORTUNITY, THEREFORE LESSENING THE GOVERNMENTS MONITORING ROLE. THESE RECOMMENDATIONS FOCUS ON THE FOLLOWING MAJOR ISSUES: TRAINING AND RECRUITMENTS GOALS, REPORTING PROCEDURES BASED ON BOTTOMLINE CONCEPT, AND INCENTIVES FOR THE PRIVATE SECTOR.

INCENTIVES PROGRAMS

IN ORDER FOR EMPLOYMENT AND TRAINING PROGRAMS TO SUCCEED AND BE COST EFFECTIVE FOR THE PRIVATE SECTOR, STRUCTURED INCENTIVE PROGRAMS MUST BE INTRODUCED AND RATIFIED BY CONGRESS. THESE STRUCTURED INCENTIVE PROGRAMS WOULD CONSIST OF HIGHER AND EXPANDED TAX BREAKS FOR REAL DOLLARS SPENT ON TRAINING PROGRAMS SERVING THE ECONOMICALLY DISADVANTAGED IN IDENTIFIED TARGET AREAS. ANOTHER INCENTIVE PROGRAM WOULD BE FOR A PROVISION THAT WOULD ALLOW THE PRIVATE SECTOR TO OBTAIN AGREMENTS FROM THE RECEIPIENTS OF THE SCHOLARSHIPS THAT THEY WILL WORK FOR THE COMPANY FOR A SPECIFIED NUMBER OF YEARS.

MINORITY RECRUITMENT

ENTRY LEVEL:

BASED ON THE PREVIOUS SUCCESSES AND STUDIES INTO EMPLOYMENT AND TRAINING RECRUITMENT, COMMUNITY BASED ORGANIZATIONS HAVE DONE A COST EFFECTIVE JOB IN RECRUITMENT AND PLACEMENT OF THE HARD CORE UNEMPLOYED. BY SIGNIFICANTLY INCREASING COMMUNITY BASED ORGANIZATION PARTICIAPTION IN THE RECRUITMENT EFFORT, THE PRIVATE SECTOR COULD DECREASE THEIR RECRUITMENT AND PLACEMENT COSTS, BOOST LOCAL ECONOMIES BY EMPLOYING LOCAL PEOPLE FOR LOCAL JOBS, AND REDUCE TRAINING COSTS BY EMPLOYING SKILLED WORKERS. THESE COMMUNITY BASED ORGANIZATIONS ARE STRATEGICALLY LOCATED IN MINORITY RESIDENTIAL AREAS AND WOULD BE ABLE TO FOCUS A CONCENTRATED APPROACH TOWARD MINORITY RECRUITMENT, E.G.

PROFESSIONAL/TECHNICAL LEVEL:

THERE EXISTS A VAST NUMBER OF QUALIFIED MINORITIES CAPABLE OF IMMEDIATELY FILLING PRIVATE SECTOR VACANCIES. DYNAMIC INDUSTRIES MUST ESTABLISH LINKAGES WITH NATIONAL MINORITY ORGANIZATIONS FOR THE PURPOSE OF IDENTIFICATION, RECRUITMENT, AND PLACEMENT OF THESE TECHNICIANS AND PROFESSIONALS.

THESE NATIONAL ORGANIZATIONS SUCH AS NATIONAL COUNCIL OF LA RAZA, G.I. FORUM, VETS OUTREACH PROGRAM, SER-JOBS FOR PROGRESS, NATIONAL URBAN LEAGUE, AND THE NATIONAL ORGANIZATION OF WOMEN STAY ABREAST OF EMPLOYMENT TRENDS AND OPPORTUNITIES. MINORITY AND FEMALE JOB SEEKERS USUALLY CONTACT THESE ORGANIZATIONS REGARDING EMPLOYMENT OPPORTUNITIES. MINORITY AND FEMALE RECRUITMENT EFFORTS MUST BE EMPHASIZED BY THE PRIVATE SECTOR IF THEY ARE SINCERE ABOUT AFFIRMATIVE ACTION. FURTHERMORE, AFTER EMPLOYMENT, MINORITIES AND WOMEN MUST HAVE ACCESS TO UPWARD MOBILITY PROGRAMS AND BE ALLOWED THE OPPORTUNITY TO GROW WITHIN AN ORGANIZATION.

URBAN ENTERPRISE ZONES

RECENT LEGISLATION SPONSORED BY REPRESENTATIVES KEMP AND GARCIA REGARDING URBAN ENTERPRISE ZONES NEEDS TO BE MADE MORE ATTRACTIVE FOR THE PRIVATE SECTOR. CURRENTLY THE KEMP-GARCIA BILL ONLY ALLOWS FOR A FIVE PERCENT EMPLOYER WAGE TAX CREDIT FOR TRAINING. WE WOULD FAVOR HIGHER TAX BREAK INCENTIVES FOR THESE INNOVATIVE PRIVATE ORGANIZATIONS BY ALLOWING UP TO A FIFTY PERCENT TAX BREAK FOR TRAINING PURPOSES. ONLY IF THESE TRAINING TAX BREAKS ARE MADE AVAILABLE, CAN WE EXPECT THESE INDUSTRIES TO MOVE INTO DISADVANTAGED AREAS, THEREBY CREATING MORE JOBS AND IMPROVING LOCAL ECONOMIES.

PRIVATE/PUBLIC SECTOR PARTNERSHIPS

IN ORDER FOR DYNAMIC, PRIVATE ORGANIZATIONS TO MOVE INTO DISADVANTAGED AREAS WITH HIGH UNEMPLOYMENT RATES, A NEED EXISTS FOR PRE-WORK TRAINING PROGRAMS AND ON-THE-JOB EXPERIENCES. VESTIBULE TRAINING PROGRAMS CONCENTRATING ON THE WORLD-OF-WORK AND BASIC SKILLS NEED TO BE SUBSIDIZED BY BOTH SECTORS, THROUGH COOPERATIVE EDUCATIONAL AGREEMENTS. THE PUBLIC SECTOR COULD IDENTIFY, RECRUIT, AND TRAIN THESE UNEMPLOYED AND DISADVANTAGED PERSONS WHILE THE PRIVATE SECTOR COULD INVEST TRAINING DOLLARS AND SET ASIDE A PREDETERMINED NUMBER OF JOBS. POLICY MAKERS MUST LOOK AT SUCCESSFUL EMPLOYMENT AND TRAINING PROGRAMS AND INCORPORATE THESE SUCCESSFUL EXPERIENCES

INTO THESE NEW PROGRAMS.

GOALS AND TIMETABLE

GOALS AND TIMETABLES ARE AN IMPORTANT AND ESSENTIAL MANAGEMENT TOOL FOR MONITORING AND ACHIEVING PROGRESS TOWARDS ANY DESIRED END WHETHER IT IS THE CONSTRUCTION OF A BUILDING, INCREASE IN SALES OR AFFIRMATIVE ACTION RESULTS. THE CONTROVERSY OVER THE USE OF GOALS AND TIMETABLES SHOULD NOT FOCUS ON ABOLISHING A RECOGNIZED USEFUL MANAGEMENT TOOL, BUT ON REFINING THE DATA BASE AND THE PROCESS WITH WHICH THIS "TOOL" IS USED. FOR EXAMPLE, PRESENT REGULATIONS FOR NONCONSTRUCTION FEDERAL CONTRACTORS REQUIRE AN ANALYSIS OF THE AVAILABILITY OF MINORITIES AND WOMEN DRAWN FROM CONSIDERATION OF EIGHT FACTORS. INDUSTRY CLAIMS THIS ANALYSIS IS A CUMBERSOME AND TIME CONSUMING PROCESS, THE RESULTS OF WHICH ARE QUESTIONABLE BECAUSE OF THE UNRELIABILITY OF THE DATA BASE. WE RECOMMEND THAT THE "8" FACTOR ANALYSIS BE REPLACED WITH WHAT WE TERM: "INDUSTRY BASELINE PERCENTAGE CONCEPT". A SIMPLE AND ROUGH SKETCH WOULD BE AS FOLLOWS:

A. OFCCP WOULD INITIALLY DEVELOP A LIST OF LIKE SUPPLY AND SERVICE INDUSTRIES SUCH AS BANKING, OIL AND GAS, ELECTRONICS, UNIVERSITIES, ETC.

B. OFCCP WOULD THEN OBTAIN EEO-1 REPORTS (EEO-6 REPORTS FOR UNIVERSITIES) FOR ALL COMPANIES AND GROUP THEM LIKE INDUSTRIES BY STATE OR OTHER GEOGRAPHICAL AREAS AS ESTABLISHED IN (A) ABOVE. IT SHOULD BE NOTED THAT THE JOINT REPORTING COMMITTEE SHOULD MAKE THIS DATA AVAILABLE ON A MORE CURRENT BASIS.

C. THE PERCENTAGE OF MINORITIES AND FEMALES WOULD THEN BE DETERMINED FOR EACH EEO-1 OR EEO-6 CATEGORY FOR THE TOTAL INDUSTRY. THE MEAN AVERAGE PERCENTAGE FOR EACH CATEGORY WOULD CONSTITUTE THAT INDUSTRY'S BASE-LINE PERCENTAGE. PERCENTAGES WOULD VARY BY STATE.

D. USING A COMBINATION OF DATA ON MINORITIES AND WOMEN FROM THE 1980 DECENNIAL CENSUS OF THE POPULATION.

OFCCP WOULD PROVIDE TO FEDERAL CONTRACTORS THE PERCENTAGE OF MINORITIES AND WOMEN IN THE CIVILIAN LABOR FORCE BY CATEGORY FOR EACH INDUSTRY, THEREBY ESTABLISHING THE ULTIMATE GOAL.

E. EACH FEDERAL CONTRACTOR EMPLOYING 100 OR MORE PERSONS THAT FALL BELOW THE BASELINE PERCENTAGE WOULD BE REQUIRED TO WORK TOWARD THE INDUSTRY'S BASELINE PERCENTAGE DURING A PRESCRIBED PERIOD OF TIME. A COMPANY'S PROGRESS TOWARD REACHING THE MINIMUM PERCENTAGE WOULD BE EVALUATED ON AN ANNUAL BASIS TAKING INTO CONSIDERATION NUMBER OF HIRING OR PROMOTION OPPORTUNITIES, APPLICANT FLOW DATA, SPECIALIZED RECRUITMENT EFFORTS, ETC.

F. EACH FEDERAL CONTRACTOR EMPLOYING 100 OR MORE PERSONS WHICH INITIALLY EXCEEDS THE INDUSTRY'S BASELINE PERCENTAGE WOULD CONTINUE TOWARD THE ULTIMATE GOAL, WHICH IS THE 1980 DECENNIAL CIVILIAN LABOR FORCE DATA.

G. OFCCP WOULD DEVELOP A SCHEDULE OF GRADUATED INCENTIVES WHICH WOULD BE APPLIED TO EACH COMPANY DEPENDING ON THEIR PROGRESS TOWARD MEETING THE INDUSTRY'S ESTABLISHED GOALS, OTHER SIGNIFICANT AFFIRMATIVE ACTION EFFORTS OR THEIR FAILURE TO REASONABLE PROGRESS TOWARD THESE GOALS. THE SCHEDULE OF GRADUATED INCENTIVES IS ENUMERATED ON ANOTHER PART OF TODAY'S TESTIMONY.

RECORDKEEPING AND REPORTING REQUIREMENTS

I. IT IS ESSENTIAL THAT MINIMAL BUT ADEQUATE RECORDKEEPING REQUIREMENTS BE ESTABLISHED IN ORDER TO EFFECTIVELY EVALUATE A FEDERAL NON-CONSTRUCTION CONTRACTOR'S BOTTOM LINE ANNUAL PROGRESS IN THE HIRING OF MINORITIES AND WOMEN. SUCH DATA WOULD INCLUDE FOR EACH JOB GROUP, THE FOLLOWING INFORMATION:

A. NO. OF JOB OPPORTUNITIES (HIRES AND PROMOTIONS)

B. NO. OF HIRES AND PROMOTIONS BY RACE AND SEX.

C. APPLICANT FLOW DATA BY SEX, MINORITY GROUP AND OTHERS.

D. DOCUMENTED EVIDENCE OF GOOD FAITH EFFORTS INCLUDING SIGNIFICANT AFFIRMATIVE ACTION PROGRAMS.

II. FEDERAL CONTRACTORS SHOULD BE REQUIRED TO HAVE IN PLACE AN INTERNAL AUDIT PROGRAM FOR SELF EVALUATION OF BOTTOM LINE PROGRESS ON A CONTINUING BASIS AND AN ANALYSIS OF THEIR ANNUAL PROGRESS REPORT. THIS ANALYSIS AND ANNUAL PROGRESS REPORT WOULD BE MADE AVAILABLE TO OFCCP ON REQUEST FOR THE FOLLOWING PURPOSE.

A. IN THE TENTATIVE SELECTION OF FEDERAL CONTRACTORS FOR REVIEW, OFCCP WOULD FIRST REQUEST AND ANALYZE THE REPORTS FOR BOTTOM LINE RESULTS. FEDERAL CONTRACTORS PROVIDING EVIDENCE OF SIGNIFICANT EFFORTS TOWARD MEETING THE GOALS WOULD NOT BE SHCEDULED FOR FULL COMPLIANCE REVIEWS BUT INSTEAD WOULD BE EXEMPTED FROM REGULAR SCHEDULED REVIEWS FOR A THREE YEAR PERIOD AT WHICH TIME THEIR PROGRESS WOULD AGAIN BE SUBJECT TO A REVIEW.

B. FEDERAL CONTRACTORS NOT SHOWING ADEQUATE PROGRESS WOULD BE SUBJECT TO A FULL COMPLIANCE REVIEW.

III. WE RECOMMEND THAT THE PRESENT REQUIREMENTS FOR THE USE OF FORM CC-257, MONTHLY MANPOWER UTILIZATION REPORT, BE CONTINUED BY CONSTRUCTION CONTRACTORS TO REPORT THEIR AGGREGATE WORKFORCE IN COVERED AREAS AS PUBLISHED BY OFCCP. HOWEVER, ITS USE SHOULD BE MODIFIED AS FOLLOWS:

A. CONTRACTORS PARTICIPATING IN RECOGNIZED VOLUNTARY AFFIRMATIVE ACTION PLAN ASSOCIATIONS WOULD BE EXEMPT TO CC-257 REPORTING.

B. NON-PARTICIPATING CONSTRUCTION CONTRACTORS PERFORMING LESS THAN 3,000 HOURS MONTHLY IN A COVERED AREA WOULD BE EXEMPT FROM CC-257 REPORTING BUT NEVERTHELESS BE SUBJECT TO OFCCP COMPLIANCE REVIEWS WHEN WARRANTED.

C. NON-PARTICIPATING CONSTRUCTION CONTRACTORS PERFORMING 3,000 OR MORE HOURS MONTHLY IN A COVERED AREA WOULD COMPLETE AND MAINTAIN MONTHLY CC-257 REPORTS BUT WOULD SUBMIT SUCH REPORTS TO OFCCP ONLY ON SPECIFIC REQUESTS BY OFCCP.

D. REPORTS SUBMITTED TO OFCCP WHICH REFLECT A COMPANY IS WITHIN ESTABLISHED GOAL RANGES FOR MINORITIES AND WOMEN IS PRESUMED TO BE IN COMPLIANCE WITH ITS EEO OBLIGATIONS AND WILL BE GIVEN A SIX MONTH REPORTING EXEMPTION BY OFCCP.

E. REVIEWS CONDUCTED BY OFCCP ON CONTRACTORS NOT MEETING THE GOAL RANGES BUT PROVIDING EVIDENCE OF GOOD FAITH EFFORTS WILL ALSO BE GIVEN SIX MONTHS REPORTING EXEMPTIONS.

BACKPAY AS A REMEDY

I. IN MY PREVIOUS TESTIMONY, I STATED THAT ENFORCEMENT UNDER PRESENT EXECUTIVE ORDER 11246 REGULATIONS WAS NOT PRACTICAL AS THE FINAL SANCTION, DEBARRMENT FROM FEDERAL CONTRACTS WAS NOT AN EFFECTIVE ENFORCEMENT TOOL. DEBARRMENT IS MOST DIFFICULT TO ACCOMPLISH AND IS NOT BENEFICIAL TO EITHER MINORITIES, WOMEN OR THE CONTRACTORS THEMSELVES. EVEN SO, DEBARRMENT AS THE ULTIMATE ACTION MUST REMAIN BUT IN THE INTERIM STAGES. THERE MUST BE PENALTIES FOR CONTRACTORS WHO CLEARLY DISCRIMINATE. THEREFORE, IT IS RECOMMENDED THAT THE USE OF BACKPAY AS AN APPROPRIATE REMEDY SHOULD BE CONTINUED AND APPLIED IN ANY SITUATION WHERE A FEDERAL CONTRACTOR HAS BEEN FOUND GUILTY OF DISCRIMINATION, INTENTIONAL OR NOT, AND THE AFFECTED CLASS MEMBERS CAN BE IDENTIFIED. WHERE THEY CANNOT BE IDENTIFIED, MONETARY ASSESSMENTS FOR TRAINING PROGRAMS SHOULD BE USED. IT SHOULD BE NOTED THAT UNDER OUR RECOMMENDATION OF THE INDUSTRY BASE LINE PERCENTAGE CONCEPT AND THE ACCOMPANYING REPORTING REQUIREMENTS, INSTANCES WHERE MINORITIES AND WOMEN ADVERSELY EFFECTED BY NON-SELECTION FOR OPPORTUNITIES, WHETHER APPLICANTS OR PRESENT EMPLOYEES, WILL BE MORE EASILY IDENTIFIED.

II. WE RECOMMEND THAT BACKPAY LIABILITY SHOULD BE FOR NO MORE THAN TWO YEARS CONSISTENT WITH THE PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

IN CONCLUSION, WE SUBMIT THAT AFFIRMATIVE ACTION IS A FUNDAMENTAL REMEDY TO ENSURE THAT HISPANICS AND OTHER MINORITIES AND WOMEN ARE ACCORDED THEIR RIGHTFUL PLACE IN OUR SOCIETY. AS STATED EARLIER, IT IS NOT THE INTENT OF THE AMERICAN G.I. FORUM TO SIMPLY PHILOSOPHIZE, BUT TO ALSO OFFER CONSTRUCTIVE RECOMMENDATION ON SPECIFIC ISSUES. WE SUBMIT THAT OUR RECOMMENDATIONS ARE A MORE PRACTICAL APPROACH TO AFFIRMATIVE ACTION THAN WHAT IS BEING CONSIDERED BY OFCCP'S PROPOSED REGULATIONS. IT IS OUR BELIEF THAT THE DEPARTMENT OF LABOR PROPOSED REFORMS WILL FRUSTRATE THE INTENT OF THE PROGRAM. WE SINCERELY BELIEVE THAT IF OUR RECOMMENDATIONS ARE OBJECTIVELY EVALUATED AND IMPLEMENTED, A GREAT MOVE FORWARD TO BRING ABOUT EQUAL EMPLOYMENT OPPORTUNITY WILL BE MADE.

IN BEHALF OF THE AMERICAN G.I. FORUM, I AGAIN THANK YOU FOR THE PRIVILEGE OF SPEAKING TO YOU TODAY.

SINCERELY YOURS,
Jose R Cano
JOSE R. CANO
NATIONAL CHAIRMAN

Senator HAWKINS. David Copus, National Association of Manufacturers.

Good morning.

STATEMENT OF DAVID COPUS, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY BILL McEWEN, DIRECTOR, SUBCOMMITTEE ON EQUAL EMPLOYMENT; AND BILL BARTELONE, ASSOCIATE DIRECTOR FOR HUMAN RESOURCES AND EQUAL OPPORTUNITY

Mr. COPUS. Good morning, Senator.

With me on my right, Senator, is the NAM's director of their subcommittee on equal employment. He is also the corporate director of equal employment affairs for the Monsanto Co., Bill McEwen. On my left is NAM's associate director for human resources and equal opportunity, Bill Bartelone. We have submitted an 11-page statement for the record, and I welcome the opportunity to summarize it very briefly for you this morning.

Originally, Executive Order 11246's mandate for affirmative action meant to take measures to assure nondiscrimination. Unfortunately, the business community has seen during the last 16 years, since the addition of the words "affirmative action" to the Executive order program, an ever-increasing regulatory abuse so that now the program emphasizes numbers and format rather than content and action, and the program has shifted from a cooperative, prospective, affirmative effort to an adversarial demand concentrating on retroactive relief.

The NAM believes that the $1 billion plus that is spent by major contractors each year on affirmative action can be better spent than in responding to this program as it has evolved. We have presented in our testimony our recommendations on how the program can be improved, and I would like to summarize the six major proposals.

First, and perhaps this is the most important one, the program is in such a state of disrepair that there needs to be a general regulatory review of the program rather than the piecemeal approach which the OFCCP has taken to date.

Second, and this has been emphasized by many witnesses today, the back pay and all other forms of individual relief, as well as investigation of complaints of discrimination, should be the sole province of the EEOC. I would hasten to add that critics of this approach who label this as "a return to voluntary affirmative action" are in fact clearly erroneous. This is the building of a straw person.

We do not by any measure want to return to a day without Government enforcement of the civil rights legislation. We in fact believe in a vigorous enforcement of the Civil Rights Act. What we are seeking to eliminate is the inconsistent, confusing, overlapping, duplicating, and counterproductive process which exists today, where the EEOC and the OFCCP both vie for jurisdiction in this area. We believe that in the area of investigating and remedying employment discrimination claims and the achievement of individual relieve, that that function belongs in the administrative agency created by Congress, the EEOC.

The third major reform which we would propose and summarize in our comments is that the thresholds for coverage under the Executive order program, in terms of the written requirements for an affirmative action program, should be raised. However, the raising of the threshold should be on a facility-by-facility basis because it is not just small contractors but small facilities of ever-larger contractors which bear an enormous burden in preparing written affirmative action programs which turn out to emphasize form over substance. We believe that the threshold should be raised on a facility-by-facility basis.

Fourth, we believe that the application of the Executive order program's requirements for a written affirmative action program should be limited to those facilities which have Government contracts. After all, the entire thrust of the Executive order program is tied to the procurement process, and the detailed obligations to implement a written affirmative action program should be limited to those facilities which have such contracts.

Fifth, the entire goal-setting process of the Government needs to be thoroughly overhauled, from the formation of the job groups by which affirmative action goals are set, to the factors which are used to estimate availability, to the triggering devices which are used to establish goals, to the setting of the actual goals themselves. The entire process has gotten well beyond the limits of reasonable interpretation at the present time and the entire program needs to be restructured. We have detailed in our testimony an outline of how we think that should be accomplished.

Sixth and finally, however the goal-setting process is reviewed or restructured, the emphasis under the Executive order program should always be on good faith, affirmative action efforts of the contractors and not the achievement of some artificial number. Contractors are more than willing to take affirmative action; they have been extraordinarily creative in many respects in producing programs designed to achieve affirmative action objectives. The Government's audit of affirmative action programs ought to concentrate on those good faith efforts and not on the blanket achievement of some particular number.

Senator HAWKINS. Thank you. We have a list of questions to submit to you also but I would just like to briefly ask you some questions. You state that in your opinion all complaints of discrimination should be referred to the EEOC for processing and that the OFCCP's ultimate goals and timetables should be eliminated entirely, which is in conjunction with Mr. Williams' testimony.

If these proposals were adopted, what would be the role for the OFCCP, in your opinion?

Mr. COPUS. Well, we believe that the primary role of the OFCCP has been historically, and should be in the future, one of devotion to monitoring the affirmative action efforts of contractors. It has only recently, in the last several years, become preoccupied with demands for retroactive relief and the achievement of some artificial number in the future. We believe that a return to concentration on affirmative action efforts and a monitoring of their effectiveness is the domain of the agency.

Mr. MCEWEN. For fear that you might misinterpret something that was said, we are not contending that all short-term goals should be eliminated. We are saying that ultimate goals and timetables are the ones that should be eliminated.

Those of us in business are very accustomed to working against goals and timetables. Therefore, the concept of goals, realistic goals, should not be eliminated. What we are saying is, if you are going to look at goals the concept of good faith effort goes hand in hand there. That is what makes a goal not become a quota, when the person has the right to fail, when in reality you can show that you did expend those efforts and the reasons that you did not make it were valid reasons.

Senator HAWKINS. We appreciate those comments, I am sure. We also would like to add quality control to goals and timetables.

We will submit questions to you gentlemen for the record, in the interest of time. Thank you for coming.

[The prepared statement of the National Association of Manufacturers follows:]

TESTIMONY

BEFORE THE

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

ON

OFCCP OVERSIGHT

The National Association of Manufacturers ("NAM") appreciates this opportunity to share with the Committee the views and experiences of its members regarding the Office of Federal Contract Compliance Programs ("OFCCP").

The NAM is a voluntary business organization with over 12,000 member companies located in all parts of the country. The NAM membership accounts for approximately 75 percent of the nation's manufacturing output and 80 percent of the members are generally considered to be small businesses. NAM also has an affiliation with 158,000 businesses through its Association Department and the National Industrial Council. NAM members support principles that encourage individual freedom, advancement of economic opportunities to all individuals without regard to race, sex, religion, national origin, age or physical or mental handicap. It is on behalf of our membership that we submit this testimony.

At the inception of the current Executive Order program in 1965, the term "affirmative action" meant those measures taken to insure nondiscrimination in the work forces of employers doing business with the federal government. The sixteen (16) years since have been a period of ever-increasing regulatory abuse which has severely clouded the original intent of Executive Order 11246. The regulations promulgated by the OFCCP have emphasized numbers and format rather than content. These regulations have deterred real affirmative action and stalled the progress toward equal employment. The complexity and bureaucratic nature of OFCCP's system has caused it to be concerned more with enforcing the agency's technical requirements than with helping contractors achieve meaningful affirmative action hiring and promotion results. The focus of affirmative action enforcement has shifted from prospective improvement to an adversarial relationship between contractors and the OFCCP. An example of this combative atmosphere is the case of the Firestone Tire and Rubber Company, in which the agency attempted to debar a major federal contractor because of a disagreement over a minor technicality that had no bearing on the company's practical affirmative action effort. In fact, in district court, the OFCCP conceded that it had found no evidence of discrimination at the facility involved and further conceded that the facility was making satisfactory EEO progress. Enforcement actions of this kind generate an enormous amount of unnecessary friction and hostility between OFCCP and contractors and does little to foster the cooperation that is critical for success in making any effective improvements in employment opportunities. The present affirmative action program requirements contribute little to the development of real equal opportunities for women and minorities. Company time and resources are consumed in producing meaningless paperwork and in arguing with the OFCCP over format and the relevance of required information, rather than substance.

At the request of the Senate Committee on Labor and Human Resources, the NAM has recently completed a survey of our members who participate on our Human Resources and Equal Opportunity Committee. The intent of the survey was to elicit the views of NAM members about the effectiveness of the OFCCP. After an initial review of this data, the following observations were:

o Our members noted an inconsistency in the application of compliance requirements (often times by the same E.O.S.)

o Poor management of the compliance review procedures.

o Superfluous and unwieldy information requests are often made by OFCCP field offices.

o The lengthy time in which it took to conduct, review and make a compliance/non-compliance finding is a cause for concern among those responding to our survey.

These problems divert management's attention from areas where greater equal employment efforts could be made, such as locating and remedying internal selection processes which may be biased, or making greater efforts to locate and hire qualified minorities and women. Resources which are now diverted to unproductive recordkeeping and numerical manipulating would be better spent on providing education and training programs that could enhance the marketable job skills and promotional opportunities of women and minorities and could encourage underutilized group members to pursue careers in nontraditional jobs. A recent study by the Equal Employment Advisory Council indicates that federal contractors spend $1.15 billion annually on complying with OFCCP requirements. The average cost of a single OFCCP compliance review for a large facility exceeds $20,000. In contrast to these considerable expenditures, largely for paperwork and responding to OFCCP's request for data, the agency itself has stated that only four percent of its compliance reviews yield evidence of actual discrimination. Thus it appears that the agency is targeting employers who have good affirmative action programs. The process currently required rarely yields results which justify its use. and should be eliminated. A well-organized targeting approach to reviews for recalcitrant contractors would produce the desired results. In light of these facts, it is apparent that large amounts of money are being wasted on meeting hypertechnical requirements, rather than being spent on constructive affirmative action programs, such as education and training, that would actually increase employment opportunities.

The following points summarize the highlights of our chief concerns relating to the improvement of OFCCP's administrative efforts to enforce E.O. 11246:

General Regulatory Review. NAM commends the OFCCP for initiating those portions of the proposed changes which would reduce the administrative burden on contractors. Unfortunately, however, the Department of Labor has taken a piecemeal approach. A far more comprehensive review should be undertaken so that the OFCCP's mission can be properly defined and fully integrated with the Administration's commitment to meaningful regulatory relief.

Back pay. The OFCCP's efforts to obtain back pay have also been the cause of much concern and debate over the past ten years. We cannot emphasize strongly enough that there is no provision of Executive Order No. 11246 that authorizes OFCCP to impose or seek to obtain back pay, front pay, or any other type of individual relief. In developing regulations, OFCCP has ignored the Executive Order, Congress' mandate in Title VII and relevant case law. Indeed, the OFCCPs regulations did not even refer to back pay until 1977, almost twelve years after Executive Order No. 11246 became effective. Neither the purpose of the Executive Order nor basic contract principles justify the creation of a back pay remedy. The Executive Order is designed to enlarge the available labor pool of qualified workers. All back pay claims should be processed through the EEOC; Congress has indicated its intent that this form of remedy be handled there. Individual relief under the Executive Order is not necessary to effectuate the Order's purposes. Furthermore, OFCCP's success should not be calculated in terms of back pay extracted from contractors.

Of course, in one sense Congress may share some of the responsibility for the OFCCP's emphasis on back pay recovery, since a traditional measure, in oversight hearings, of an agency's effectiveness in combatting employment discrimination has been the amount of monetary relief obtained. We would suggest that a more appropriate yardstick would be to judge the increase in the numbers of jobs available to minorities and women.

Complaints. The OFCCP should refer all complaints of discrimination to the EEOC. Congress has created a detailed administrative process for handling complaints, both individual and systematic, and the OFCCP should not duplicate that role.

Thresholds. NAM favors the raising of the thresholds for developing written affirmative action plans, but the thresholds should be on a facility by facility basis, rather than on a contractor basis. The OFCCP's resources, as well as contractors', will be better utilized if small establishments are relieved of the paperwork requirements of a written AAP.

Contracting Facility. The written AAP obligation should also be limited to those facilities which actually have a contract with the government. The Executive Order's primary concern is with expanding the pool of qualified workers on government contracts and this purpose is fully served by requiring those facilities to develop written AAP's. Extending that requirement to non-contracting facilities does not further the objectives of the Executive Order.

Job Groups. The present OFCCP approach to job groups is often artificial and meaningless to contractors. The job groups are often too small or fail to reflect a contractor's organizational and occupational structure. Contractors should be permitted to do the utilization analysis on the basis of a job group classification system that truly reflects internal work force realities, with EEO-1 categories reflected in the job goups where relevant. If a contractor's job grouping appears to reflect accurately the company's work content, pay or lines of promotion, the OFCCP should not engage in endless exercises of restructuring job groups to create a finding of underutilization.

Availability. We believe the present requirements under availability contribute little to the development of equal opportunities for women and minorities. While the regulations have never actually defined availability, the

OFCCP has stated in its compliance manual that "availability" is the percentage of minorities and females who have the requisite skills for a job group or who are capable of acquiring them. Contractors usually define availability in terms of those minorities and/or women who have the requisite skills in the area in which the contractor can reasonably recruit. Therefore:

1. The eight availability factors should be replaced by two factors:
    a. The availability of women and minorities having requisite skills in the area in which the contractor can reasonably recruit based on the 1980 Census Data updated annually by the Bureau of Employment Security. This census data would be the most reliable and up-to-date demographic information available.
    b. The availability of promotable and transferable women and minorities within the contractor's organization.
2. The OFCCP should abandon efforts to set numerical goals based upon "future" availability. Consideration should be given to the Final Report on Availability Analysis prepared for the Department of Labor by Abt Associates, Inc. This report admits that after long and careful analysis they were unable to develop a viable method of calculating potential or future availability.

Goal Setting. The entire goal setting process should be reviewed. Ultimate goals and timetables should be eliminated entirely because neither employers nor the government can accurately forecast the future human resource needs on a job group basis. Employer's progress is directed toward short term goals. Immediate goals may be used to remedy underutilization of protected groups and to insure that future hiring and promotion patterns reflect the changing availability of human resource needs over time. Clearly, greater emphasis should be placed on the contractor's good faith efforts involving recruitment and training.

Show-cause notices. Another area where present procedures are not working and are having a negative effect is found in the present conciliation procedure and use of show-cause notices, with the latter becoming a routine practice, often prior to an on-site review. Allegations of discrimination should be specific and non-technical so that recommendations for corrective action can be made. They should not be subject to change at the whim of an individual compliance officer as is often the case, creating adversarial rather than cooperative positions. Effective use of administrative law judges should be expanded to increase resolution of factual differences.

OFCCP organizational structure. The present organizational structure of the OFCCP makes effective administration of the Executive Order impossible. There is little guidance or control from the OFCCP policy makers at national headquarters to the regional field offices. This makes it extremely difficult for contractors to deal or confer with OFCCP headquarters on matters of high-level policy or to obtain uniformity of programs that cross more than one of the ten regions. Additionally, inconsistent field application of regulations compounded by differing interpretations of the OFCCP's "Federal Contract Compliance Manual," has created wide variances in what is expected of contractors in program format and in the manner of conducting compliance reviews. It is not uncommon for large regional or national contractors to experience grossly inconsistent demands from several different OFCCP Area Offices. For example, a member company was told during a review that the eight-factor analysis method of determining availability must be used, unless the company's own method resulted in a higher availability rate. In other words, the method was irrelevant; only the increase in the availability rate was important. When a high-level headquarter OFCCP official was asked about this rather dubious approach to availability, he replied in essence, that there was little the headquarters's staff could do about such aberrant behavior. This very frustrating and complex system relates only to a program OFCCP has created itself, thus completely alienating the business community. It is recommended that the OFCCP be restructured so that the Assistant Regional Administrators report to the Directors in headquarters responsible for compliance activities.

In conclusion, it should be restated that the concept of affirmative action is based on the objective of assisting minorities and women in overcoming historic barriers to equal access and equal opportunity in all aspects of employment. NAM believes that the government agencies should redirect the time and effort now spent on excessive regulatory considerations to providing employers with better guidance in their prospective efforts to provide equal employment opportunity. We believe that the competition between the EEOC and OFCCP for remedial action has been counterproductive. Executive Order No. 11246 which governs the OFCCP, was not intended to go beyond the intent of Congress as expressed in Title VII, nor to expand substantive rights or give the Executive branch a shortcut around the procedural safeguards of Title VII. The purpose of the Order is clear: it was intended to encourage federal contractors to devise creative programs aimed at insuring non-discrimination in employment. Affirmative action, properly structured, regulated, and enforced has many benefits in strengthening human resources and the social fabric of the nation. It provides for equal opportunities in employment which American industry has and will continue to actively support.

Senator HAWKINS. Our next witness is Maria Rouco, Cuban National Planning Council.

STATEMENT OF MARIA ROUCO, DIRECTOR, CUBAN NATIONAL PLANNING COUNCIL, INC., WASHINGTON, D.C.

Ms. ROUCO. Good morning, Senator Hawkins.

My name is Maria Rouco, and I am the director of the Washington office of the Cuban National Planning Council. Our organization, which is headquartered in Miami, is a national agency which provides numerous services to this country's growing Cuban-American community. We greatly appreciate the opportunity to come before you today and present our perspective on increasing opportunities for minorities and women, the programs and policies we should develop to accomplish this goal, and the proper role thereof for the Government and the private sector.

I believe there is no doubt in anyone's mind that the goal of equal employment for minorities and women must be pursued. In spite of the many advances achieved by minorities, particularly in the past two decades, it is safe to predict that the terms "discrimination" and "equal employment" have a long way to go before being entered in the lexicon of archaic terminology.

In previous hearings you have heard testimony from civil rights organizations which pointed to the disproportionate difference in unemployment rates and median income levels among minorities. In our communities we are confronted daily by this reality, and this reality if confirmed by rising unemployment rates quoted weekly by the media.

On the flip side, testimony was presented also by companies which, upon being awarded Federal contracts, must comply with the regulations and requirements authorized by Executive Order 11246 and enforced by the Office of Federal Contract Compliance Programs of the Department of Labor. The primary complaint voiced in the hearings was not a lack of desire to comply with this order but rather the necessity to demonstrate compliance by filing numerous documents and completing lengthy compliance reports.

Basically, therefore, it appears that the reforms needed are not of a philosophical nature; that is, changes in the essence of Executive Order 11246, which was justly created to eliminate discriminatory barriers and to increase the opportunities for minorities and women in the Federal contract workplace. What must be changed are the regulations which control enforcement. However, it is imperative that in streamlining reports, reducing paperwork, and in improving compliance tactics, that changes or regulations that are implemented do in no way lessen or impede the attainment of the initial objectives of this Executive order.

I have named discrimination as a major obstacle for minorities in achieving parity in the labor force. I sincerely believe discrimination is a strong factor. However, I also recognize that a quantity of other factors contribute to the underrepresentation of women and minorities in the labor force.

By no means am I seeking to excuse discrimination but it would be a disservice to our communities to isolate it as the sole reason for unequal employment opportunities.

Today we are seeking answers and solutions. New policies, new programs, new directions. We at CNPC believe that at the root of the problems lie a host of other realities that we must first accept and change before parity in the labor force can be achieved.

Specifically confronting minorities are deficiencies in the educational and employment opportunities afforded to members of our communities.

This committee has already held hearings on the upcoming reauthorization of CETA. As we discuss the issues raised today, I cannot help but comment that many of the same issues and problems that this committee will address in this particular set of hearings have been or will be addressed with the reauthorization of CETA.

If employers discriminate against minorities because these particular individuals are stereotypically depicted as unskilled labor, perhaps the solution to this problem is not to ask employers to complete lengthy and expensive compliance reports. Perhaps the answer is to use the money and the paper saved to create and improve the educational and training opportunities available to minorities and women.

An important factor that the Government and the private sector must keep in mind is that a real effort must be made to incorporate within it those individuals outside the economic mainstream. Government cannot totally absorb the cost of maintaining those individuals, nor can Government shrug off its responsibility to its citizenry and leave to chance that the private sector will bear all costs.

Thus, in addressing two other questions used by this committee—what programs and policies should be developed to realize the goal of equal employment for minorities and women, and what are the proper roles of Government and the private sector—the answers go hand in hand: First, the Federal Government needs to reaffirm its commitment to a national policy on employment and training; and, second, this comprehensive employment and training program must be an equal partnership between Government and business.

Recent studies show that 85 percent of the Nation's employment opportunities are created and maintained by its 7 million private sector employers. Furthermore, although job growth exists within the large corporations, a study by the National Commission for Employment Policy demonstrated that between 1969 and 1976, small, young firms with less than 20 employees created 66 percent of all new jobs during that 7-year period. More recent studies have confirmed the same.

Additionally, data compiled by the U.S. Department of Commerce revealed that smaller firms have been growing in employment at a rate of 40 percent annually, about 13 times faster than older, larger firms. The growth and promotion of small businesses cannot be overemphasized, as it is important to remember that small firms provide more than 80 percent of the jobs for youth, minorities, and other disadvantaged people.

My experience with the private sector has shown that employers are highly receptive to ideas and innovative programs designed to train individuals for their employment opportunities. Likewise, employers have been receptive to the notion of increasing employment opportunities. Yet when one considers the added costs associated with training essentially unskilled individuals, one can understand how a cost-conscious private sector might choose the alternative of training individuals who are not altogether unskilled and thus, on a per capita basis, less costly to train. Therefore it becomes necessary to find ways to reduce that cost in order to create more jobs and develop the employability of each individual.

The private sector, by its very nature, is in business for business—and profits—sake. On this premise it will not, at its own expense, totally incur the added expense of training the unskilled and the structurally unemployed who in most cases are minorities.

Government, on the other hand, has three alternatives in dealing with the structurally unemployed. It can either provide the individual with no assistance, thereby forcing the individual to seek whatever means he can to fend for himself, including crime; it can provide the individual with an income by means of public assistance, be it welfare, food stamps, which as a system in itself leads to perpetuating a dependency on the Government and an increased expenditure for the taxpaying citizenry; or it can provide the individual with an income by way of a stipend while he is being trained for a specific job, thereby preparing him to be a self-sufficient, taxpaying member of society.

Obviously, option 1 is not in line with our country's philosophy and social consciousness. We firmly believe that option 2, except in individual cases where for physical or mental reasons the individual is unable to work, as a solution is inefficient, expensive, and detrimental to the recipient as well as to the Government.

The third option, on the contrary, is beneficial to both. Through an initial investment in the individual, the Government shapes a productive, self-sufficient member of society.

At this point, however, it must be emphasized that although the groundwork was laid for Government initiative, for maximum effectiveness, a true partnership must exist between Government and the private sector. If, in effect, to work with a cost-conscious private sector it becomes necessary to reduce the cost of training the structurally unemployed for jobs within the private sector, the role of the Federal Government in this particular situation becomes vital. The Federal Government must establish that if it is to participate with the private sector in programs such as partially subsidized on-the-job training, tax relief, and other forms of financial incentives aimed at increasing job opportunities within the private sector, these particular jobs must be filled by women, minorities, and economically disadvantaged individuals.

A final point must be made to promote the placement of the structurally unemployed within the private sector. As the National Employment and Training System addresses primarily the problem of structural unemployment, it addresses itself to an audience that is, in large percentages, minority. Hence their placement within the private sector enhances their chances for advancement while assisting the private sector in reaching the timing and hiring goals of their affirmative action plans.

Of course, our proposal of a truly effective, streamlined employment and training program in partnership with Government, the private sector, and community-based organizations does not imply that all problems will be immediately eradicated, nor that nothing else should be tried. We applaud and encourage private sector initiatives to improve education and employment opportunities. An announcement was made recently of plans by certain corporations, among them General Motors and Control Data Corp., to consider the establishment of technical high schools in the Washington, D.C., area. Such efforts are to be lauded and will greatly benefit our youth.

However, we are still confronted with the problem of our unemployed adults. As we address these issues and renew our commitment to pursuing a national goal of equal opportunity for women and minorities, it is essential that we not only agree philosophically with this goal but that we demonstrate this belief through action.

The latest announcement by the Office of Management and Budget to grant the Department of Labor $1.56 billion in fiscal year 1983 for its employment and training programs will by no means allow us to accomplish any of the goals that we set for ourselves today.

We are in total agreement with the objective of a balanced budget. We are in total agreement with the philosophy of the American work ethic; it is likewise inherent in our culture. However, the reality exists that millions of individuals do not work simply because they possess no marketable skills.

Our position is firm: Culturally, Hispanics are not inclined to use Government services. Our drive for self-sufficiency is strong. Our people do not want welfare benefits. Our people want an opportunity to work—an equal opportunity.

We encourage this committee to continue its work in developing strong policies which are committed to the betterment of the quality of life for all Americans. We are extremely interested in working with this committee, and offer our assistance in any way possible. We at the Cuban National Planning Council share your concern and interest in working toward our stated national goal of improving opportunities for minorities and women.

Thank you very much, Senator.

Senator HAWKINS. Thank you so much. Your statement is inspiring and very truthful. I can relate to a lot of your statements, coming from the State of Florida where we have a lot of the problems as well as the solutions. We look forward to working with you. You are a great inspiration, to be such a leader at such a young age.

Ms. ROUCO. Thank you, Senator.

Senator HAWKINS. Thank you.

Our next witnesses are Carol Grossman and Marcia Greenberger. Ms. Grossman is representing the Women's Equity Action League, WEAL, and Marcia Greenberger is representing the National Women's Law Center, Washington, D.C.

We are running into a time problem since we have to leave soon, the staff can continue the hearing. I apologize but I have a previous commitment.

We will move right along with Ms. Grossman.

STATEMENT OF CAROL BURROUGHS GROSSMAN, NATIONAL PRESIDENT, WOMEN'S EQUITY ACTION LEAGUE, ACCOMPANIED BY MARCIA GREENBERGER AND MARGARET KOHN, NATIONAL WOMEN'S LAW CENTER

Ms. **Grossman**. Thank you, Senator Hawkins.

My name is Carol Burroughs Grossman. I am national president of the Women's Equity Action League. Joining me today are Marcia Greenberger and Margaret Kohn of the National Women's Law Center. Ms. Greenberger and her colleague bring to the committee special expertise on the current status and potential future of the contract compliance program.

The National Women's Law Center represents WEAL and others in seeking enforcement of an outstanding court order requiring OFCCP to enforce Executive Order 11246 with respect to educational institutions. Ms. Greenberger will also present to the committee valuable information on the progress of women in nontraditional occupations through the Executive order program, both in the past and hopefully in the future.

Because of the interrelated nature of our testimony, I would like to request that questions be reserved until we have both completed our statements.

Senator **Hawkins**. I do have a question for you, Ms. Grossman. I believe that it is your contention that Chairman Hatch said that the OFCCP failed to incorporate women and minorities into federally backed employment opportunities. Is that correct?

Ms. **Grossman**. Yes, I think that is true.

Senator **Hawkins**. What he did say was that in the past OFCCP did not understand its mission, since it measured its accomplishments by how many debarments it obtained and how much back pay it got for the classes, rather than how many employment opportunities it created. Because of those statements, that is why we are holding this hearing today. He has asked that I make that statement for the record.

Your example of the Colorado School of Mines, if they were a Federal contractor then they were required to have a written affirmative action program. That is not a voluntary program; that is mandatory.

Ms. **Grossman**. That is right.

Senator **Hawkins**. The fact that in the past they had no written plan is a violation of OFCCP's regulation. Now you are telling us that they still have no new women faculty members even though they have a written affirmative action program. For the record, we will be asking the school to answer your assertions that no action and no move toward integrating that faculty had taken place without the activity you suggested. He asked that I let you know that.

Ms. **Grossman**. OK. I appreciate that. I think I would rephrase that slightly. As you know, Senator Hatch and I have disagreed a little bit in terms of our assessment of exactly the mission of OFCCP. We just simply differ on that characterization.

At hearings held before this committee in July and October, testimony by contractors and statements by the Chair posited the conclusion, as you mention, that the contract compliance program fails in its mission to incorporate women and minorities into federally backed employment opportunities.

The reasons given for this alleged failure were various. Most witnesses complained of management inefficiency, and some protested the reliance on what were termed "confrontive tactics." Many believed that OFCCP should work in a spirit of support and cooperation with employers, more than it had in the past, and the emphasis was on the need to reduce paperwork and other regulatory burdens.

It is our experience that most ardent complaints about costs, paperwork, and procedures, when examined in depth, are usually found to arise from fundamental disagreement with the purpose of the Executive order and the mission of the agency. We understand that there is a recent Battelle study that tends to support this analysis, and I would like to urge the committee to contact the Small Business Administration, which commissioned the study, and add the report to the record of these hearings.

Senator HAWKINS. We will do that.

Ms. GROSSMAN. WEAL bases its vision of the future of the contract compliance program on one unalterable fact: The Federal Government has a constitutional obligation to protect the procurement dollar, provided by taxpayers of both sexes and all races, from benefiting those who would discriminate. We assert as well that to honor that obligation requires an active enforcement program with proven and effective tools at its disposal..

There are those who would assert that this very basic premise implies an inappropriate and unprovoked hostility between the Federal Government and its citizen-contractors. We would respond that beneficiaries of public funds are always held accountable to the taxpayer. It must be recognized and accepted that an enforcement program will always engender tension and criticism. We see no reason to be alarmed that enforcement of civil rights laws requires hard work for contractors and a firm posture by the Federal Government.

The current contract compliance program, with investigative powers and the capacity to debar contractors, did not spring up overnight. Starting in the 1940's, the Nation had sought a way to insure that minorities, and then women, would be able to share in the economic benefits of Federal spending. Voluntary programs, no matter how creatively designed or earnestly promoted, failed time and time again. Inevitably, such programs gave way to enforcement-oriented efforts to stop discrimination, and only now are we beginning to see what real commitment to civil rights enforcement can produce.

I would like to add as an aside that I disagree very strongly with Dr. Glazer's assessment that the marked increase of women in medical schools in this country is a good example of voluntary programs. It is not an example of volunteerism at all. It is directly related to title 9 of the Education Amendments of 1972 and the enforcement effort in that area.

There are two examples out of WEAL's efforts to bring women into the academic workplace that we think will serve to illuminate the present posture and future potential of the contract compliance program.

The Colorado School of Mines, as you mentioned earlier, is a beneficiary of substantial Federal contracts and is subject to all of the Executive order's affirmative action obligations. A complaint filed by WEAL in April, 1981 and a subsequent investigation by OFCCP revealed that no affirmative action program with goals and timetables had ever been prepared by the school.

A decade of essentially voluntary compliance with no intervention by Federal officials had produced only 10 women faculty members, 5.3 percent of the faculty. Only one woman was tenured at the School of Mines and not a single at the time had been promoted through the ranks to a tenured position.

Although there has been an investigation and a letter of findings validating our complaint, the situation has not yet been remedied. The Department of Labor is examining a proposed plan by the school which WEAL has yet to see. However, it must be recognized by the committee that no action, no move toward integrating the faculty at this institution which is the beneficiary of millions of tax dollars, would have yet taken place without WEAL's complaint, OFCCP's investigatory powers, and the potential threat of sanctions.

Meager growth in numbers of women and minorities is often justified by the limited growth of tenure-impacted or highly technical universities. It is argued that where hiring opportunities in many disciplines may be limited, or where availability of qualified women and minorities has been low, growth must come slowly.

Well, WEAL has found that even when these hurdles are not present, problems remain when motivation is lacking. The John F. Kennedy School of Government was instituted and its faculty put into place during the 1970's, the year of affirmative action. However, in the fall of 1980 WEAL found at the Kennedy School a record equally abysmal to that of the Colorado School of Mines, and one that mirrored the faculty composition of the older schools within Harvard University.

Only 1 year ago, as a result of having no affirmative action procedures in place, the Kennedy School had no tenured women faculty. Only three of the junior, nontenured faculty were women, and none a minority. Since the filing of WEAL's complaint and OFCCP's onsite compliance review, four new women and minorities have been added to the faculty of the Kennedy School.

Although it is not yet certain that the school will continue in its progress—and indeed there was some "robbing of Peter to pay Paul" for the short term results—we are definitely heartened by this new evidence. There is evidence as well that the rest of the university now also believes that the Government will enforce Executive Order 11246, and there have been some steps taken in the Medical School, in the Law School, and in the faculty of Arts and Sciences and other areas of Harvard to markedly improve the affirmative action program, since our complaint was filed.

Therefore, Senator Hawkins, where there is a will there is a way. We cannot help to conclude, though, that but for the existence of the WEAL consent decree which forces OFCCP to use the procedures and remedies available to it, neither Harvard nor the Colorado School of Mines would have been (yet) required to address their poor records in hiring, pay, and promotion. Thus, two layers of legal pressure were needed to spur any movement forward at those schools.

I should not need to remind the committee how important is the presence of women and minorities at all levels of academia. If we are not going to perpetuate the patterns of the past, the next generation of students must see men and women of all races as thinkers, teachers, and creators. As the Chair of this committee pointed out in his statement of October 22, full educational experiences may be as important a determiner of future economic status as the absence of employment discrimination.

That women and minorities have traditionally been excluded from faculties across this country cannot be denied. Institutions of higher education must, as other employers, take affirmative steps to remedy this problem both by practicing nondiscrimination and by putting into place processes which will assure women and minorities a share of the Federal dollars which support those institutions. Only by focusing on process and results will permanent change come about.

Enforcement of Executive order is necessary to assure this result. We agree that enforcement efforts must be efficient, and as Marcia Greenberger will detail next, they can be if given support for the management systems and the regulatory structure proposed last year. Any retreat, including that proposed by the Reagan administration, will subvert what we do not question for a minute to be our national policy—the increased participation of women and minorities in the workplace through the enforcement of civil rights legislation.

[The following information was supplied for the record:]

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ADDENDUM TO TESTIMONY PRESENTED BY

CAROL BURROUGHS GROSSMAN

ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE

To the Committee:

Women's Equity Action League appreciates this opportunity to complete our portion of the record of the OFCCP oversight hearings begun last July. We hope that our testimony has been of interest and use to the Committee. Please call on us if we can provide further information.

In order that we be sure our December 8th testimony was responsive to the question posed by the Chair for those hearings, we add the following statement:

Women's Equity Action League firmly believes in the national goal of improving employment opportunities for women and minorities. In fact, WEAL believes that where the federal pursestrings are involved, the government has an affirmative obligation under the Constitution of the United States to assure that women and minorities receive fair treatment. This includes providing effective remedies for individuals who may be victims of discrimination by federal contractors, and seeking redress for the long period of our history when discrimination by federal contractors was accepted.

The contract compliance program which has grown up over forty years is the best vehicle so far devised to pursue that national goal. While the program itself may not always have worked as efficiently as both contractors and protected groups would desire, there is no fundamental problem with the basis of the program.

The program, however, has been shackled by at least two major operational flaws -- lack of a workable management information system, and failure to adequately train investigative personnel. WEAL hopes the Committee will consider carefully the testimony presented by the National Women's Law Center on these issues. Almost every criticism raised by employer-contractors in the July hearings can be directly attributed to these two problems.

The management problems can be solved, and the program given new life, with commitment of resources. We do not accept the premise that because the program has had its failures and its weaknesses, it should be abandoned in favor of yet-undefined new ideas, based in voluntarism. History has demonstrated that voluntary compliance does not work.

In response to questions raised by the Acting Chair when we testified on December 8th, we take this opportunity to attach both our complaint against Colorado School of Mines, filed in April of this year, and the Notice of Deficiency issued by the Department of Labor after investigation of the complaint. We would be most interested in hearing what response the Chair is able to get from Colorado School of Mines concerning their hiring and promotion record for women over the last 14 years.

WEAL would also like to respond to a question recently raised by Committee staff regarding our July testimony. It is our understanding that one or more of the universities discussed in July has contacted the Committee to dispute our analysis of the proposed Department of Labor regulations and their impact on academia.

The data provided this Committee in July was derived from federal procurement data used by the Department of Labor. It shows that in 1980, of the contracts issued to educational institutions, 19% were for amounts over $1 million. 81% of the contracts issued, including those to the major universities we identified in our testimony, were for less than $1 million each, although often a school received more than one contract and thus received much more than the proposed "threshold". One important element of our testimony was to point out that such multiple contracts, however, would not be added together under the proposed rules.

It is true that some of the schools listed as contractors on the computer printout may have had contracts pre-existing in 1980 which were not listed. Some of those individual contracts could be valued at over $1 million. However, the Department of Labor had no independent means of determining that status. As a result, it is highly questionable whether any enforcement activity could be predicted for those schools. It is, in addition, still in question whether contracts which take more than one year to complete will be treated as single contracts over $1 million by the Department should the proposed regulations take effect.

Furthermore, we stand by our assertion that the Department of Labor has seriously underestimated the number of contractors which will be freed from any responsibility under their proposals. Since no specific analysis was made of the impact on educational institutions except that which we used for our comparisons, the Department is clearly misleading the public on this issue.

Therefore, we stand by our assertions in July. We regret that we were not given an opportunity to respond earlier to any questions about our testimony.

Respectfully submitted,

Carol Burroughs Grossman /jea/
Carol Burroughs Grossman
National President

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance Programs
2500 Curtis Street -- Suite 100
Denver, CO 80205

(303)837-6366
FTS-327-6366

SEP 29 1981

Ms. Carol B. Grossman, President
Women's Equity Action League
805 15th Street, N.W.
Suite 822
Washington, D.C. 20005

Dear Ms. Grossman:

Attached is a copy of the deficiency notification submitted to the Colorado School of Mines on this date.

As indicated, the onsite portion of the review was completed on September 18, 1981.

The contractor was found not to have maintained an affirmative action program, and, as a result, a show cause notice was issued on July 15, 1981.

I have recommended to the Assistant Regional Administrator for the Office of Federal Contract Compliance Programs that the case be prepared for administrative enforcement. The President of the Colorado School of Mines has, however, assured us that they will submit an acceptable affirmative action program to our office by October 16, 1981. If this is the case, administrative proceedings will become a moot issue.

We will keep you advised of the progress in this case. If you have any questions, please phone me or Mrs. Helene Heil at (303) 837-6366.

Sincerely,

Dennis J. Santistevan
DENNIS J. SANTISTEVAN
Denver Area Office Director
Office of Federal Contract Compliance
Programs/ESA

Attachments

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance Programs
2500 Curtis Street Suite 100
Denver, CO 80205

(303)837-6366
FTS-327-6366

Dr. Guy T. McBride
President
Colorado School of Mines
Golden, CO 80401

Dear Dr. McBride:

Thank you for the courtesies extended to Mrs. Helene Heil and Mr. Roberto Juarez during the compliance review of your facility on September 15-18, 1981.

The outstanding deficiencies noted during the review are listed in the enclosure. You are required to remedy them in accordance with the principles for corrective action which are also contained in the enclosure. Your commitments must be detailed in a written conciliation agreement with this office.

As you are aware from our letter of September 15, 1981, I have recommended to the Assistant Regional Administrator for the Office of Federal Contract Compliance Programs that the case be prepared for administrative enforcement. You have been advised that if we receive an acceptable affirmative action program by October 16, 1981, as you have indicated, administrative proceeding will become a moot issue.

In an effort to expedite the resolution of the outstanding issues we request that a meeting be set up to discuss the additional deficiencies found as a result of the compliance review. Please phone Mrs. Helene Heil at 837-6366 upon receipt of this letter to arrange a meeting date.

Sincerely,

DENNIS J. SANTISTEVAN
Denver Area Office Director
Office of Federal Contract Compliance
Programs/ESA

cc: Dr. William M. Mueller
Vice President for Academic Affairs
Colorado School of Mines
Golden, CO 80401

cc: Mr. Andrew Lopez
Affirmative Action Officer
Colorado School of Mines
Golden, CO 80401

Ms. Nancy Connick
Assistant Attorney General
Human Resources Section
The State of Colorado
Office of the Attorney General
State Services Building
1525 Sherman St, 3rd Floor
Denver, CO 80203

Enclosure to letter dated 45 71

Colorado School of Mines
Golden, CO 80401

Deficiencies and Corrective Action Necessary to Achieve Compliance

1. Deficiency: The Colorado School of Mines has not maintained an AAP as required by 41 CFR 60-1.40 and 60-2. Although parts of the AAP were submitted since the show cause notice dated July 15, 1971, the following remain outstanding:

   a. A workforce analysis for classified staff as required by 41 CFR 60-2.

   b. A utilization analysis as required by 41 CFR 60-2.11(a), which includes updated availability statistics.

   c. Goals and timetables as required by 41 CFR 60-2.12 and 60-2.13(c).

   d. An identification of problem areas section as required by 41 CFR 60-2.13(d).

   e. A section on the development and execution of action oriented programs as required by 41 CFR 60-2.13(f).

   f. A section on the compliance of personnel policies and practices with the Sex Discrimination Guidelines as required by 41 CFR 60-2.13(h).

   g. A section on the consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures as required by 41 CFR 60-2.13(j).

   Corrective Action

   Submit an affirmative action program which includes the above required ingredients.

2. Deficiency: There appear to be wage disparities between males and females in the following jobs:

   a. Assistant Professor in Humanities. A female assistant professor who was hired in 1979 as an instructor and promoted to assistant professor in 1980, earns less than a male instructor who was hired in 1979. The male has not been promoted and does not have his PhD while the female received her PhD in 980.

b. Associate Professor in Math. A female associate professor, who was promoted in 1981, is one of the lowest paid associate professors in the School. Two male assistant professors in her department, with less time in rank and less experience since receiving their PhD's, earn considerably more than the female. Records show that one of the males was hired in 1978 at a salary exceeding the rate paid to the female who has been employed since 1975.

Corrective Action

Provide a complete rationale for the differences in salaries paid to the females noted above, which includes documentation; or submit a plan for remedial action.

3. Deficiency: The AAP does not indicate that employment practices were reviewed to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities (41 CFR 60-50.2(b).

Corrective Action

Review employment practices as required by the regulations.

4. Deficiency: The EEO clause (Section 202 of Executive Order 11246, as amended) is not incorporated in the contractor's purchase orders or contracts valued at $10,000 or more.

Corrective Action

Incorporate the EEO clause in purchase orders or contracts as required. The clause may be included by reference.

5. Deficiency: Affirmative Action Programs for Disabled Veterans and Veterans of the Vietnam Era and Handicapped workers were not maintained (41 CFR 60-250.5(a) and 41 CFR 741.5(a)).

Corrective Action

Develop, maintain and implement AAP's meeting the requirements of the regulations. Incorporate the requirements of 41 CFR 60-250.5, 250.6, 741.5 and 741.6 into the programs.

6. Deficiency: The contractor does not include the affirmative action clause in each of its covered contracts or subcontracts (41 CFR 60-250.4 and 60-741.4).

Corrective Action

Include the affirmative action clause in each covered contract or subcontract. The clause may be incorporated by reference in accordance with 41 CFR 60-250.22 and 60-741.22.

WEAL

Women's Equity Action League
805 15th Street, N.W., Suite 822
Washington, D.C. 20005

(202) 638-4560

COMPLAINT OF THE
WOMEN'S EQUITY ACTION LEAGUE (WEAL)
TO THE
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
AGAINST THE
COLORADO SCHOOL OF MINES
GOLDEN, COLORADO

The Women's Equity Action League (WEAL) has reason to believe that the Colorado School of Mines has failed to meet the requirements of a federal contractor mandated by Executive Order 11246, as amended, and outlined in Revised Order No. 4, and subsequent directives.

According to the information available to WEAL, deficiencies lie in the following areas[1]:

1) inadequate representation of women in all areas of the school's administration, i.e. board of trustees, administration, and faculty;

2) failure to recruit and hire significant number of women faculty for all academic departments;

3) failure to promote women into the tenured professorial ranks;

4) salary inequity between male and female faculty; and

5) an incomplete, inadequate and largely concealed Affirmative Action Compliance Program.

Academic and Non-academic Administration

Of the 28 persons designated in the 1981-82 Bulletin as "Administration" at the Colorado School of Mines (hereafter referred to as CSM), only 2 or 7% are women (see Appendix A). Within this administrative group, women are placed as follows:

- of 5 Vice Presidents and Deans, 0 are women;
- of 10 Directors, 1 is a woman (Dir. of Student Activities - 10%);
- of 9 Managers/Administrative Officers, 1 is a woman (Personnel Officer - 11.1%).

Other persons holding administrative posts in addition to faculty rank (excluding those above) include:

- 1 woman out of 12 (asst. deans, assts. to deans, institute directors)
- 0 women out of 13 academic department heads.

In addition, there are no women members of the CSM Board of Trustees other than a lone student representative. There have been three vacancies recently on the Board, which is appointed by the Governor (subject to state statute).

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[1] Although the complaint herein is based on sex discrimination, we have reason to suspect that there are equally disturbing deficiencies in the Affirmative Action Compliance Program related to the recruitment, hiring and promotion of racial minorities.

Representation of Women on the Faculty as a Whole

Among the four faculty ranks (Professor, Associate Professor, Assistant Professor, and Instructor), there are only 10 women out of a total of 188 faculty members. Women, then, represent only 5.3% of the total regular faculty. Although CSM does not officially recognize the concept of "tenure" in its usual sense, 70% of the total faculty in the four ranks have de facto tenure in that they hold the rank of Full Professor or Associate Professor. Of the 131 faculty with de facto tenure, only one is female (.8%). Women represent 10 out of 47 or 17.5% of the untenured faculty who are functionally on tenure-track. According to the information available to WEAL, all women currently on the faculty were hired since 1974.

Hiring

The late 1970's was a period of significant expansion for the School of Mines (see Appendix B). The size of the faculty nearly doubled during that period. Of current faculty[2], 47% were hired (or rehired) since 1974; 60% since 1970. Appendix C shows the distribution of the 1981-82 Bulletin faculty by rank, sex and year of hire.

The distribution of faculty hired by the CSM since 1974 by discipline/department is provided as Appendix D. As even these incomplete[2] figures indicate, hiring has taken place in every department since 1974 when the first CSM Affirmative Action Plan was put in place. Yet, only 11.4% of those current faculty hired since 1974 are women and 40% of these women are in Physical Education and Athletics or Humanities and Social Sciences. In contrast, only 13.6% of the total faculty hired were in these two departments. Other hiring statistics of interest by discipline groups are as follows:

Engineering	3 women out of 39 (7.1%)
Phys. Science, Environ'l. Science, Math., and Mineral Economics	3 women out of 27 (10%)
Humanities and Social Sciences	3 women out of 9 (33.3%)
Physical Education & Ath.	1 woman out of 3 (33.3%)
Military Science	0 women out of 4 (0%)

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[2] Information concerning the total number of faculty hired at the CSM was not available to WEAL; therefore, the information provided at Appendices C and D gives a distribution of those hired since 1974 by department who are still on the faculty as of the 1981-82 Bulletin. A complete investigation would necessarily include all faculty hired by the CSM during that period.

Distribution of Women Faculty by Discipline/Department

Of a total of 12 degree-granting departments at the Colorado School of Mines, 7 have no women faculty:

Chemistry	Chemical and Petroleum-Refining Engineering
Physics	Petroleum Engineering
Geophysics	Metallurgical Engineering
	Mining Engineering

Within the three physical science disciplines, the number of women faculty is zero. In looking at the availability data for these disciplines, chemistry, in particular, stands out with a substantial proportion of women. Since women represent more than 10% of all Ph.D. chemists, then one would reasonably expect two of the CSM chemistry faculty to be women. There are no women on the chemistry faculty even though at least 8 faculty members have been hired since 1974 in that department. In addition, five more departments at the School of Mines have, according to our data, only 1 woman faculty member:

* Mathematics
* Mineral Economics
* Geological Engineering
+ Environmental Science Program
Physical Education and Athletics

The disproportionate number of male to female physical education faculty is particularly alarming. However, representation of women in mathematics could also be reasonably expected to be higher based not only on availability but the number of hiring opportunities in recent years. Although women appear to represent a respectable proportion of the Basic Engineering faculty based on published availability data, efforts to increase their numbers seem to have been suspended after two women were hired in 1975.

Tenured vs. Non-tenured Faculty

As the figures in Appendix B indicate, the representation of women in the "tenured" faculty ranks at Mines is extremely small: .8%. Moreover, the single woman at the tenured rank of professor was hired in 1977 directly at the rank of professor. Women remain totally unrepresented at the rank of associate professor, although a number of current assistant professors appear to be well-qualified for promotion and have been "in rank" as long or longer than their male colleagues. Our information indicates that not only have a number of well-qualified women at Mines been turned down for promotion to associate professor, but that no woman in recent history has held that rank, if ever at all. WEAL contends that the promotion patterns of women at the Colorado School of Mines show considerable evidence of sex discrimination.

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*Degree-granting Department
+This program does not actually have full department status.

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---

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+This program does not actually have full department status.

well above the average in the population in the county." WEAL has not quarrel with the goal for increasing Hispanic persons; however, one cannot help but notice the continuity of that goal from one plan to another and the conspicuous absense of a goal for women and other minorities.

WEAL believes that the past and current Affirmative Action Plans of the Colorado School of Mines are inadequate in all areas of goal-setting for increased numbers of women, increased diversity among the various departments, and greater representation in the upper levels of faculty rank.

Grievance Procedures

The Colorado School of Mines has set out a number of review procedures for the appeal of employment decisions and the determination of discrimination. Several cases in which these committees were employed have been brought to our attention. In each case the decision of such a committee was to challenge the procedures and/or decisions originally made. Although the findings of such committees are not binding on the administration, there appears to be a pattern where determinations in favor of a complainant are largely ignored by the school administration.

We are also currently aware of one case in which a tenured faculty member's contract was not renewed for the next year allegedly for supporting the sex discrimination case of a colleague before the EEOC. His dismissal was reviewed by a faculty committee, which twice found the charges against him unsubstantiated. We know, moreover, of no instance involving allegations of discrimination in which the committee review process resulted in a reversal of the administrative action. It appears to WEAL that the grievance processes designed to handle both discrimination and non-discrimination-related employment matters should be carefully scrutinized.

WEAL believes that, if our information is correct, the Colorado School of Mines' infringements of federal regulations and its own affirmative action policy, and its lack of progress in hiring and promoting women should result in the School being required to:

1) set affirmative action goals and timetables for the hiring of women for each level of the tenure track faculty;

2) set affirmative action goals significantly higher than current availability data would require for every department in which there is no woman faculty member;

3) review all promotion cases of current and former women faculty;

4) conduct a salary equity analysis; and

5) require substantial strengthening of the School's overall Affirmative Action Plan and Program.

WEAL requests the OFCCP of the Department of Labor to investigate the above charges and develop appropriate remedial actions in a timely manner. We further request that WEAL be consulted concerning the proposed remedies to the situation before any final agreement about them is reached between OFCCP and the Colorado School of Mines.

April 6, 1981

Carol B. Grossman, National President
Women's Equity Action League

Senator **Hawkins**. Thank you. I do have to leave but I would like all of you ladies to know that we have questions to submit to you for the record, which we would like you to answer also. I do apologize for there not being another Senator here to take over probably the best part of this whole show.

Ms. **Grossman**. You are right.

Ms. **Greenberger**. Senator Hawkins, I appreciate the time problems. I did want to make one point in conclusion, though. I think what we saw in some of the testimony was a strain going throughout that if the educational system were working better, that employment opportunities for women and minorities would open up—in essence, what was implied—by themselves.

I think it is particularly troubling, and I did want to make this point—that at the very time that we are talking about in essence letting employers off the hook and raising the prospect of telling employers that they may not be subject to sanctions if they do not hire women and minorities for jobs, even using Federal funds, at the same time we hear discussions about alleviating the laws we have that deal with discrimination in education. We see opposition to job training programs that were targeted for women in welfare, and we see vocational education reauthorization opposed in its targeting methods to deal with women's problems. We see proposals to, in essence, gut title IX which has been so important in opening education opportunities for women.

Therefore, I do really want to make the point that in essence, looking across the board at all the segments of society and seeing they are all interrelated, it is certainly true women and minorities face problems because of discrimination throughout all the segments. However, the response cannot be to allow each segment off in essence scot-free while blaming the others, and that I am afraid to say is what we often see now as one of the responses that is coming forward by the administration and by others on the Hill.

Thank you.

Senator **Hawkins**. Thank you for your statement. If you would like to make a comment for the record also, Ms. Kohn, it will be recorded but I must be excused.

Ms. **Kohn**. Thank you.

I would like to point out for the record that the importance to women of nontraditional jobs is very great. As you may know, jobs traditionally held by women in this country are those that are less well paid, less likely to be unionized, and do not afford women the opportunity to support their families and themselves.

It is true that 7 out of 10 families living in poverty today are headed by women, and that if this trend of the increased feminization of poverty continues, by the year 2000 women would constitute the great majority of the poor in this country.

The other fact that has increasingly been documented is that women are available and do seek out nontraditional jobs. When the opportunities are available to them, and they have gradually been made available to them through the application of goals and timetables and in those instances in which the Executive order has been enforced, we have seen substantial increases in the numbers of women in nontraditional jobs. The advantage of nontraditional jobs is that they have traditionally paid far higher wages and provided a much better living for women, as for men, which is one of the reasons why they are so desirable. In the construction trades and in similar jobs, the norm has been that it has been a male environment and the presence of women has been discouraged, if not prohibited.

The success in employing women has been very marked, for example, in a couple of different areas. One is in the maritime industry where goals were set and large numbers of women have started working on the docks, making very good salaries. Where those opportunities have opened up, women have been available and shown up to fill them.

In the city of Seattle, a local goal for women in construction trades was set at 12 percent. That local goal was met. It has now been set higher at 18 percent. It has been met and exceeded, the 12 percent goal. It is possible to meet goals and timetables when there is a sincere and honest attempt to do so, with followthrough and enforcement from the government agency that sets those goals.

We think it is critically important that goals and timetables be maintained because when there are simply voluntary exhortations to employers to do something, we have seen in the case of the Colorado School of Mines and in other instances, for example in the mining area, where there was no enforcement by the Office of Federal Contract Compliance Programs for women, nothing happened. After there was an enforcement effort, the increase in women underground miners has been tremendous. Our written testimony includes in it the very detailed numbers.

Mr. FLOREZ. Do you have written testimony or was it the one that Marcia submitted? Is it written testimony that you are submitting as well?

Ms. KOHN. Yes, we are submitting testimony jointly and I believe the committee has it already.

Mr. FLOREZ. We received it this morning.

Ms. KOHN. Yes. Perhaps Marcia Greenberger would like to make some final statement.

Ms. GREENBERGER. I did want to just make one point finally about the problems with the Office of Federal Contract Compliance and the complaints that have been articulated about lack of efficiency and the fact that it takes too long, and the like. We, too, certainly have been frustrated at times with OFCCP's enforcement, and we see that basically as a product of the fact that the management skills, the very basic, elementary management skills and techniques that should be a part of that office have not been instituted and have not been put into effect.

There has been over the last few years an effort by OFCCP to identify what is needed, after the reorganization, to start setting some of these priorities. For instance, they have not yet been able to put all of their information about the contractors they are responsible for and the complaints and compliance reviews that are underway on a computer system. That very simple, elementary management technique has not been given the kind of priority that is necessary in order to allow the office to be more efficient. The plan to put the basic information on computer has been halted by this administration.

Similarly, one very important element that has been identified is more training for OFCCP investigators. Plans for training of the investigators in specified industries, such as higher education or construction, have not been put into effect and have not yet gone on to this point. Now we see very dramatic suggestions about staff reductions that would in essence cripple the effectiveness that, frankly, we have been amazed to see that OFCCP has been able to have despite these handicaps that they have been operating under.

When one looks at an agency such as the Internal Revenue Service, we cannot imagine for a minute that these kinds of handicaps would have been allowed to exist for very long. There is too high a priority placed upon assurance that the Internal Revenue Service personnel are trained and that there is the computer technology and the like to ease their work. We would like to see that same kind of priority placed upon eliminating discrimination in this country and OFCCP being given the staff and the resources it needs to do the job.

Thank you.

Mr. FLOREZ. Thank you.

There is one point in concluding: The purpose of this hearing and Thursday's hearing is primarily to hear what suggestions you people have, and anyone out there, in improving the opportunities for women and minorities. We will keep the record open until December 20, and hopefully people would submit as many recommendations as possible. The Senator is serious and is keeping an open mind as to how we can continue to carry forth the intent of the Executive order.

At this point I order printed all statement's of those who could not attend and other pertinent material submited for the record.

[The prepared statement of the National Women's Law Center and information referred to follow:]

NATIONAL WOMEN'S LAW CENTER
1751 N STREET, N.W.
WASHINGTON, D. C. 20036-2886

NANCY DUFF CAMPBELL
MARCIA D. GREENBERGER
MARGARET A. KOHN
SHIRLEY J. WILCHER*
ATTORNEYS AT LAW

*NOT ADMITTED IN D.C.

TELEPHONE
(202) 872-0670

TESTIMONY OF THE NATIONAL WOMEN'S LAW CENTER BEFORE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

December 8, 1981

We appreciate the opportunity to present testimony today on the programs and policies our country should develop to pursue the national goal of improving opportunities for women and minorities, and the proper role of the government, the private sector, and other groups in furthering this national goal. In particular, we will address these questions as they affect women seeking to obtain and hold blue collar jobs traditionally held by men.

Our testimony will discuss facts demonstrating that women seeking to hold such nontraditional jobs face pervasive sex discrimination, and that the federal government, through the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") not only can play, but has a Constitutional obligation to play, a role in eliminating this discrimination by employers receiving federal contracts. With a strong enforcement effort mounted by OFCCP, we can make substantial progress in eliminating the sex discrimination in the trades which is rampant today.

The National Women's Law Center

The National Women's Law Center is a Washington-based organization designed to provide legal representation for women's interests. In this capacity, we have dealt over the years with problems of sex discrimination in employment, and with the OFCCP's enforcement of Excutive Order 11246, prohibiting employment discrimination by companies receiving federal contracts.

For example, we were co-counsel in a case Advocates for Women, et al. v. Marshall, et al., Civ. Action No. 76-0862 and Women in Blue Collar Jobs, et al. v. Marshall, et al., Civ. Action No. 76-527 (D.D.C.) brought on behalf of a number of groups throughout the country training women for construction jobs. The case was brought against OFCCP challenging its failure to require affirmative action, including goals and timetables for women by construction companies receiving federal contract funds. The case led to a consent decree in 1979 requiring affirmative action, including goals and timetables, for women in construction under Executive Order 11246. Further, we filed a petition with the Department of Labor, Bureau of Apprenticeship Training, on behalf of a number of groups to require affirmative action, including goals and timetables, for women in apprenticeship programs.

We have participated in an OFCCP working group on the application of Executive Order enforcement to the construction industry. The Center is also now preparing a manual to assist women in securing nontraditional jobs.

We have worked on issues of OFCCP enforcement as it affects other employment sectors as well. We are counsel representing several national organizations and individuals in a suit challenging, inter alia, OFCCP's failure to enforce the sex discrimination provisions of the Executive Order against higher education institutions. Women's Equity Action League, et al. v. Bell, et al., Civ. Action No. 74-1720 (D.D.C.). The OFCCP is currently subject to a far reaching order in this case issued in December, 1977. Pending in court now is a motion to show cause why OFFCP should not be held in contempt of the order for noncompliance with the court order.

The National Women's Law Center also represents Women Employed as an intervenor in the action to debar Harris Bank from federal contracts now pending before the Secretary of Labor. The Administrative Law Judge in the case had found that Harris violated the non-discrimination terms of the Executive Order and owed over $12 million in back pay to an affected class of women and minorities. Center staff were invited to participate in sessions to advise OFCCP in changes to improve its program, leading to changes in regulations promulgated in 1979.

Finally, the Center is closely watching the changes in OFCCP that the Administration is suggesting. Center staff have attended meetings with Administration officials to discuss these changes, and have filed comments on behalf of a number of groups on the proposed changes and questions as they affect women in construction.

Discrimination Faced By Women In Nontraditional Jobs

Women constitute the majority of the poor in this country. Seven out of ten families living in poverty are headed by women. According to the National Advisory Council on Economic Opportunity's Study, if the proportion of poor who are in female-headed families were to increase at the same rate as in 1967-1977, women would comprise 100% of the poverty population by the year 2000.

Women's poverty flows directly from discrimination in the workplace. Their inferior status in the workplace is clearly illustrated by their under-representation in the skilled, highly-paid blue collar jobs. In 1978, women represented only 0.9% of carpenters, 0.2% of electricians, 0.5% of plumbers and pipefitters, and 1.6% of nonautomotive mechanics.[1/] These statistics reflected the dismal picture of women unable to break into these higher paying jobs.

Women Are Available to Hold Nontraditional Jobs

Contractors often claim that women are simply not available to hold construction or other nontraditional blue collar jobs because women do not want such jobs, or do not have sufficient training to hold them. These claims are disputed heatedly by groups across the country working to train and place women in nontraditional jobs. Rather than being based on fact, the con-

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[1/] U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, pp. 153-154 (January, 1978).

tractors' comments reflect their own lack of commitment to hire women for nontraditional jobs, and their intention to find excuses for their failure to hire these women.

An important fact which must be emphasized is that almost all people seeking work in the construction trades for the first time are unskilled. As OFCCP itself has found, male construction workers are often hired without prior experience and from unrelated jobs. In the non-union sector, and almost 60% of the construction industry workforce is non-union, after obtaining employment an individual is typically given on-the-job training, and possibly some classroom instruction or correspondence courses.[2/] Moreover, even in the union sector, only about 20% of the workers enter the trades through apprenticeship programs, and apprenticeship programs do not usually require past experience.[3/] In short, claims that not enough women have training, when the bulk of people who enter construction do so without training, are without merit.

Moreover, the evidence supports the fact that there are women, both trained and untrained, who badly want these jobs. Claims of unavailability have a particularly hollow ring today, when in 1980 12.6% of male construction workers were unemployed in contrast to 17.1% of female construction workers. The Southeast Women's Employment Coalition placed an advertisement in the

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[2/] Special Studies Section Branch, Special Analysis Division of Program Analysis, Office of Federal Contract Compliance Programs, Women in Construction, May 7, 1981 at 20, 25. Hereinafter "OFCCP Study."

[3/] OFCCP Study at 21, 25.

Louisville Courier Journal on July 31, 1981 in order to recruit women to enter heavy construction in road work. From this one ad, they received over four hundred telephone responses and two hundred letters. These responses came from women with training, as well as those seeking to hold such jobs for the first time.[4] For employers to come forward and claim they cannot find women who want jobs in the blue collar trades strains credulity.

A Strong OFCCP Enforcement Program Is Needed To Make Progress

It was not until 1978 that real progress for women began to be made in the construction industry -- and that progress can be traced to one critical event. In 1978, for the first time the Department of Labor promulgated regulations pursuant to Executive Order 11246 requiring affirmative action, including goals and timetables, for women by covered construction contractors. The goals were set at 3.1% in 1978, to rise in a year to 5.1%, and in the next year to the present goal of 6.9%. 41 C.F.R. §60.4. With this signal, women's opportunities to hold nontraditional jobs improved substantially. Voluntary employer efforts did not work. It took the new mandatory regulations to make a difference.

The experience in Massachusetts provides a good example of the potentially dramatic effect of these regulations. Before the regulations were issued, there was only one female construction worker in the state. Three years later, there were over 400 women in the construction workforce.[5] An OFCCP Study has recognized that:

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[4] Comments of Southeast Women's Employment Coalition filed with James W. Cisco, Acting Director, Division of Program Policy, OFCCP, dated October 14, 1981.

> ". . . Where there are large federal projects which a contractor who is aware of his obligation, or is being monitored; females are having more success being admitted to the unions as either apprentices or journeyworkers."[6]

The study further stated ". . . compliance reviews by OFCCP in the construction industry resulted in an increase in the participation of females." OFCCP Study at 49.

The connection between goals and timetables and the elimination of discrimination cannot be more clear. The key tool for increasing this demand is goals, increased in size and better enforced. They are a critical and indispensable part of the heart and purpose of the Executive Order. The Department of Labor itself has stated:

> The Department of Labor's experience has demonstrated that goals and timetables are the most concrete and effective system for increasing the representation of women and minorities in employment areas from which they have previously been excluded or have not been represented in proportion to their availability.

43 F.R. 20761 (May 12, 1978).

Further, the OFCCP's own, more recent study found that ". . . in most cases, contractors admitted that no women would be employed in the trades in the absence of goals." OFCCP Study at

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[5] Testimony of Susan Brophy, Women for Blue Collar Jobs, Before the Senate Committee on Labor and Human Resources, October 1, 1981.

[6] OFCCP Study at 20.

30. Women can attest to this fact as well. A woman holding a job in the mines in Utah was told ". . . you have a great work record but the mine's no place for a woman, except the government is making me hire them".[7]

The United States Civil Rights Commission also recognized that goals and timetables were required under the Executive Order because they were necessary to eliminate discrimination:

> "By the end of the 1960s, it became clear that more vigorous enforcement was needed to cause Federal contractors, particularly construction contractors and building trades unions, to make significant changes in their employment practices. At the same time, there was growing recognition that even if personal and overt discrimination were ended, equal employment opportunity could still be denied; a "color-conscious" approach was needed to overcome the present effects of past discrimination. In order to determine progress, or the lack of progress, in implementing affirmative action programs, therefore, the concept of "goals and timetables" was adopted as the cornerstone of the Federal contract compliance program under Executive Order No. 11246." (footnotes omitted)(emphasis added).[8]

The Commission made a similar finding specifically with regard to women in construction. U.S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions, May, 1976 at 145. These findings were echoed by the Department of Labor as well:

> A review of the status of women in the skilled trades shows that unless specific affirmative

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[7] Coal Mining Women's Support Team News, Vol. 3, Issue 10, May 1981, pp. 6-7.

[8] U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination, January, 1981 at 22.

> action steps are prescribed, employment opportunities in these trades will not reach the female workforce.

43 F.R. 20762 (May 12, 1978). The OFCCP Study confirms this position. It states:

> . . . the hiring of women in construction has only occurred, to any degree, since the implemention of OFCCP's goals for women in 1978.

OFCCP Study at 57. The Study also states:

> Many of the women [interviewed in the Study because they were in the trades] (often to their dismay) felt that OFFCP's goals for women in construction were directly responsible for their acceptance into the trades. Statistics from several training and referral services support this.

OFCCP Study at 67. Finally, the Study concludes:

> In this context, the importance of goals and enforcement proceedings cannot be overstated. In most areas, the goals provided the main catalyst for interaction between institutions.

OFCCP Study at 78.

This experience has been duplicated time after time in the area of nontraditional jobs when the government has given an indication that it is serious about its enforcement obligations. The coal industry is another case in point.

> In 1973, 1/1000 of 1% of all underground coal miners hired were women;
>
> In 1974, 1/100 of 1% of all underground coal miners hired were women;
>
> In 1975, 1% of all underground coal miners hired were women;
>
> In 1976, 2% of all underground coal miners hired were women;
>
> In 1977, 3.4% of all underground coal miners hired were women;

In 1978, 4.2% of all underground coal miners hired were women;

In 1979, 11.4% of all underground coal miners hired were women;

In 1980, 8.7% of all underground coal miners hired were women; and

Between January and June 1981, over 9% of all underground coal miners hired were women.[9]

It is significant to note the dramatic jump in the number of women underground miners between 1978 and 1979 came after the Coal Employment Project filed a complaint with OFCCP, and the OFCCP targeted the coal industry for a concentrated review. The increases in the numbers of women applying for jobs as miners refects as well the interest of women in holding these jobs once they learn the jobs are available to them. Peabody Coal Company, by far the nation's largest coal producer, reports that:

In 1972, no women applied for mining jobs at Peabody in Kentucky;

In 1973, 15 women applied for mining jobs at Peabody in Kentucky;

In 1974, 94 women applied for mining jobs at Peabody in Kentucky;

In 1975, 291 women applied for mining jobs at Peabody in Kentucky;

In 1976, 297 women applied for mining jobs at Peabody in Kentucky;

In 1977, 720 women applied for mining jobs at

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[9] Coal Employment Project and Coal Mining Women's Support Team, Comments on the Labor Department's Advance Notice of Proposed Rulemaking, 46 F.R. 36213 (July 14, 1981) as amended 46 F.R. 42490 (August 21, 1981) Regarding Affirmative Action Requirements for Government Contractors, September 14, 1981. ("Coal Employment Project Comments").

Peabody in Kentucky;

> In 1978, 1,131 women applied for mining jobs at Peabody in Kentucky.[10/]

The experience of the City of Seattle provides another good example. In Seattle, when the goal of 12% was actually achieved, it was raised. In 1980-81, the goal was increased to 18%. Seattle City Ordinance 101432. There is nothing to suggest that the female workforce in Seattle was unique. Rather, efforts in local enforcement combined with outreach programs and federal support produced the success. See P. Lehman, "Women Journey into the Skilled Trades," Worklife, August 1977, quoted in U.S. Dept. of Labor News, Employment Standards Administration, Sept. 11, 1980.

The maritime industry experience is also relevant. In 1972, the Maritime Aministration adopted a requirement for goals and timetables for women in shipbuilding construction. The entry level goal for women in 1976 was 20%. Since that time, the applicant flow at some shipyards has run as high as the rate of the general workforce participation rate of women in the area. It must be kept in mind that shipyards, in comparison to contruction sites, can be far more hazardous. Moreover, extremely heavy lifting and strenuous activity is involved in shipyard construction.

Similarly, goals have been set for women in skilled and semi-skilled crafts in the Bell System of the American Telephone and Telegraph Company. Goals for women were set at the percent-

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[10/] Id.

ages of women in the workforce (38% in 1973) in all jobs groups in which they were under-represented with the exception of outside skilled and semi-skilled craft jobs, where goals were set at 19%, half the female workforce figure. From 1973 to 1977, the number of women in outside skilled crafts rose from 38 to 970. 43 F.R. 20762 (May 12, 1978).

In short, women want and need these jobs. It is significant to note that many of the women who filled the construction jobs came from lower-paying so-called "women's occupations" such as sales and clerical jobs. 46 F.R. 36213, 36215-36216 (July 14, 1981). It has been estimated that two-thirds of the women holding jobs as underground miners are single heads of households.[11]

The story of Ann Byerly is not unique. Ann Byerly, a member of Lady Miners of Utah and of her UMWA local, chose mining to improve her economic status. Unable to support her family adequately in the traditionally female job of waitress and nurse's aide, she became a miner.

Ms. Byerly had married early before completing high school and after divorce was left without child support. In order to support her family, she held a series of waitress and nursing home jobs.

> "During practically all of that time, she held down two full time jobs in an attempt to make ends meet. Part of the time, she had a full time job as a nurse's aide at a nursing home and another full time job as a waitress. Sometimes she had two waitress jobs. Usually,

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[11] Coal Employment Project Comments, *supra*.

> it was 6:00 a.m. to 11:00 p.m. six days a week at work. 'In between the jobs, raising the kids and fighting and winning a battle with a serious illness, it was rough,'she says.
>
> 'The last cafe I was working at closed down because the freeway by-passed it. I seriously realized that the only good money was in the mines', she says. 'I'm conscientious about my bills. Then one of the other waitresses got a job at the mines. This one waitress -- every time I saw her she was bettering herself. Well, I've always tried to better myself too, and I figured if she could do it, I could too.'" Coal Mining Women's Support Team News, Vol. 3, Issue 10, May 1981, pp. 6-7.

This experience in Utah has been repeated around the country. On September 14, 1979, the N.Y. Daily News wrote about 24 year old Valerie Jones of Manhattan, who had worked as a secretary and office worker before becoming a bricklayer apprentice in 1979. She liked neither the confinement nor the low pay of office work and looked forward to pay at $11.50 per hour as a bricklayer as well as health and other union benefits. And the newspaper reported about Lillian Boyd, a Brooklyn N.Y. resident, who started working on the New Jersey waterfront unloading ships.

> "[Boyd] works the docks for the same reason men do -- for the money. After 11 years on welfare, supporting herself and six kids on $255 every other week the prospect of steady work at $9.40 an hour -- $350 take-home on a heavy week looked attractive." N.Y. Daily News, Sunday, Sept. 16, 1979, pp. 5, 77.

Not only these women and their children, but the country as a whole, pay a grave price for the barriers women face in securing these jobs.

The OFCCP Program Has Been Stalled Before Its Full Salutory Effects Could Be Realized

After years of splintered organization and lack of leadership, the OFCCP was reorganized and centralized within the Department of Labor. Serious attention began to be focused on the way the operation was run, and the basic management initiatives that had to be imposed in order to secure proper enforcement of the Executive Order.

One priority that was recognized was the need to place basic information on the universe of contractors OFCCP was responsible for monitoring and the status of its enforcement obligations, particularly complaints and compliance reviews, on a computer system. It was clear that there could be little coordination and control over the actions of OFCCP without a basic computerized information system. Plans to put the computer system in place have been halted. A comprehensive system does not yet exist.

Similarly, it was recognized that OFCCP personnel and investigators sorely needed training in the particular nature of the industries they were responsible for monitoring. Complainants and employers alike have been angered and frustrated by inept investigators who do not understand what questions to ask and cannot analyze the information given. This problem affects the construction industry as well. OFCCP itself has recognized there is a lack of familiarity with the construction industry. OFCCP Study at 52. Yet the necessary training programs that were planned have not been given.

There is little question that had OFCCP been allowed to continue on track, and allowed to institute the management reforms that it sorely needs, the progress toward combatting discrimination in the workplace would be measurable. It is inconceivable that the Internal Revenue Service, for example, would be similarly hamstrung were it to so sorely need management reforms. The wonder is that OFCCP has been able to secure the successes it has with so little of the basic tools it needs to operate properly.

But, today we are faced not only with a failure on the part of the Administration to move forward with needed reforms, but with a threat of the entire underpinnings of the Executive Order program itself. Beyond the budget cuts which severely limit the ability of OFCCP to mount a meaningful enforcement effort, and the proposals to curtail dramatically the number of construction and other contractors who are covered and their obligations under the Executive Order, questions are now being raised about the very tools which have made the Executive Order work -- goals and timetables and back pay.

We have discussed above the central role goals and timetables have played in placing women in construction jobs. Before their existence in 1978, the Executive Order alone simply did not work. Back pay is of critical importance as well if the Executive Order is to be meaningful. As the Supreme Court recognized in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) when discussing Title VII of the 1964 Civil Rights Act,

> "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their

> employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" 422 U.S. at 417-8, quoting from United States v. N.L. Laboratories, Inc., 479 F.2d 354, 379 (8th Cir. 1973).

So too with the Executive Order. If contractors may discriminate with impunity until the government reviews their employment policies, and then must only correct those policies for the future, they have no incentive to comply before a government review takes place. Since any enforcement plan could reach only a relatively small percentage of contractors, to eliminate retrospective relief such as back pay from available remedies, would be to eliminate any effectiveness the Order might have in securing voluntary compliance from the majority of federal contractors. See U.S. v. Duquesne Light Co., 423 F. Supp. 507, 509 (W.D. Pa. 1976).

Programs and Policies Needed to Combat Employment Discrimination

Central to any effort to combat employment discrimination is a strong Executive Order enforcement program. The Executive Order is not only an effective law, but it reflects the Constitutional obligations of the federal government to assure that it does not aid and abet discrimination.

The principle underlying the Executive Order is straightforward -- federal contract monies may not be used by companies with discriminatory employment practices and policies. This principle applies with equal force to construction as well as nonconstruction companies. Nor is this Executive Order prohibition against employment discrimination by federal contractors subject to change according to whim. The Constitution prohibits the federal government from allowing its contract funds to be used in a discriminatory way. Courts have repeatedly held that public funds, including contract funds, cannot be given to discriminatory private entities. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973); Kelsey v. Weinberger, 498 F.2d 701 (D.C. Cir. 1974); McNeal v. Tate County School District, 460 F.2d 568 (5th Cir. 1971); Rhode Island Chapter, Associated General Contractors of America v. Kreps, 450 F. Supp. 338 (D. R.I. 1978). Cf., Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

Further, the law has clearly established that without goals and timetables, discrimination continues unremedied. In the Title VII context, for example, numerous courts have recognized the essential nature of numerical goals. See, e.g., "no other method was available for affording appropriate relief. . . ." Vulcan Society v. Civil Service Comm'n, 490 F.2d 387, 398 (2d Cir. 1973); "no Negroes were hired in DPS support positions until the Allen court ordered affirmative relief. . . ." NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974). "[A]ffirmative hiring relief . . . is necessary . . .: a mere injunction against continued . . . discrimination was not effective." Morrow v. Dillard, 580 F.2d 1284, 1296 (5th Cir. 1978). See also Bridgeport Guardians Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United

States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Local 53, Inter'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969). These cases have arisen both within and outside of the construction trades.

Just as goals and timetables are essential to the program, so too back pay is a required element of the Executive Order. A legal commentator sets forth quite clearly the reasons why, without back pay, the discrimination violating the Executive Order continues unremedied. If the government were to continue to allow its funds to flow to a contractor who has failed to provide back pay, and therefore failed to remedy the discrimination, the government is violating its own Constitutional obligation as well. The article states:

> A victim of discrimination is not made whole until he receives earnings lost as a result of his employer's discriminatory practices. He remains in a position beneath that of his co-workers and continues to feel the impact of his minority status. In effect then, there is a continuation of the discrimination against him, and a continuing violation of the equal opportunity clause, until he receives an award of back pay. 'Only thus can there be a restoration of the situation, as nearly as possible to that which would have obtained but for the illegal discrimination.' And only in this way can a contractor cure his defective performance under the clause. (footnotes omitted).

Moroze, "Back Pay Awards: A Remedy Under Executive Order 11246" Buffalo Law Review 439, 446 (1976).

In sum, in order to fulfill its Constitutional obligations, and realize the goal of eliminating discrimination in the workplace, the Executive Order program must remain in place. However, it must be strengthened with the proper management tools, including training programs and computerized data keeping, to allow it to function properly.

Further, attention must be paid to other programs which can be developed to work with and support the mandate of the Executive Order. The Bureau of Apprenticeship Training has been a dismal failure in opening apprenticeship programs in nontraditional jobs to women. It has neither the will nor adequate clout to be a forceful entity in this effort. Similarly, the Administration's plans to cut job training programs, including those serving women or welfare, can only make the task of OFCCP harder. Policies gutting Title IX of the Education Amendments Act of 1972, which prohibits sex discrimination in education, cutting back on the availability of day care, and other similar efforts, can only add to rather than fight sex discrimination in this country.

Conclusion

It is clear that all facets of society contribute to the discrimination women face, and to their disadvantaged status. Employers, as well as others, bear the responsibility for sex discrimination in this country. What is needed is a strong effort by the schools, the media, employers, and government leaders to change their actions.

Moreover, history has shown that change does not take place without confrontation. Institutions, like people, will continue business as usual unless they are jolted into making a change. All segments of society must be held accountable, none should be excused.

Women need decent jobs with decent pay to support themselves and their families. To help women hold these jobs sex discrimination in the workplace must be eliminated. Rationalizations that strong enforcement of a law such as the Executive Order leads to confrontation, or singling out of employers simply do not withstand scrutiny. If this country really is serious about its goal to eliminate discrimination in the workplace, then it is time that OFCCP were given the management assistance it needs and the support to do its job.

Respectfully submitted,
Marcia D. Greenberger
Margaret A. Kohn
Marcia D. Greenberger
Margaret A. Kohn

DEC 01 1981

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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November 24, 1981

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

At Mr. Richard Chastain's request, I am responding to the questions which you enclosed with your October 26, 1981, letter to Ms. Ingrid Vorhees, of our Congressional Relations staff.

Your questions, and my responses, are enclosed. Although he could not personally respond, Mr. Chastain could and did review and approve my responses.

Once again, the Associated General Contractors of America thank you for the opportunity to testify not only to the problems which OFCCP has created, but also to the solutions to those same problems.

Sincerely,

Hubert Beatty
Executive Vice-President

cc: Ms. Ingrid Vorhees

QUESTIONS FOR CONSTRUCTION PANEL

1. In your statement, you discuss the distinctions, a lack thereof, between goals and quotas. Is it possible for OFCCP to design a regulatory system in which goals are not simply euphanism (sic) for quotas?

The fine, theoretical distinction between goals and quotas does not merit extended debate. Both denote some degree of preferential treatment on the basis of sex or race. Neither will equip women and minorities to compete with incumbents for available work. Neither will produce true equality of employment opportunity. Rewriting the rules of the numbers game would be a waste of time. OFCCP should immediately begin designing a system which will effectively encourage education and training for the women and minorities who are genuinely interested in construction work.

2. There have been several individual construction companies who have testified before this Committee concerning the problems that they have endured because of OFCCP's poor administration of the order. How should the Committee view their testimony?

The Committee should view the testimony as it would view the tip of an iceberg. Many federal and federally assisted construction contractors remain hesitant to testify. Years of harassment have produced a genuine fear of reprisal or retaliation.

In this regard, AGC applauds Director Shong's recent efforts to rein in her agency's field personnel, and thereby allay such fear.

3. You have heard testimony from the women for blue collar jobs which makes two points. First, without the Women in Construction Project, women would be effectively barred from construction employment. Secondly, construction hiring goals are a necessary tool to ensure that women move into the construction workplace. Would you care to comment on these points?

The construction industry remains intensely competitive. In order to survive, construction contractors must hire the best available workers, whether those workers are male or female, white or minority. The only persons effectively barred from construction work are those without the education and training to perform such work. The Women in Construction Project appears to be a positive project, especially because it advises the women who are genuinely interested in construction work to obtain the necessary education and training.

Construction hiring goals are counterproductive. They obscure the need to educate and train. At the same time, they pressure employers to hire unqualified and inexperienced women, who tend to perform poorly, and thereby perpetuate highly detrimental stereotypes.

QUESTION FOR AGC

4. Are there particular practices resulting from collective bargaining agreements that your members have which prevent women from receiving more construction work?

In many collective bargaining agreements construction contractors promise to hire only through the union's hiring hall. This practice does not necessarily prevent women from receiving construction work. However, it may have this effect. The solution lies in insuring that qualified women are injected into the employment system, starting with training programs.

Mr. FLOREZ. With that, we will conclude the hearings. Thank you.

[Whereupon, at 12:35 p.m., the committee recessed, to reconvene at the call of the Chair.]

OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

THURSDAY, DECEMBER 10, 1981

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to recess, at 9:40 a.m., in room 4232, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the committee) presiding.

Present: Senators Hatch, Nickles, and Denton.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. Today's hearing concludes a second series of oversight hearings on how OFCCP administers the Executive Order 11246, the affirmative action program.

This second series has dealt with the most important question; that is, if we are committed to the national goal of improving opportunities for women and minorities, how best can we pursue that goal? We asked Tuesday's and today's witnesses to answer that question.

There are those who continue to criticize this administration's commitment to that national goal. They refuse to accept the fact that this committee has held four hearings on this issue, the last and this fifth one concentrating on solutions.

The hearings have been fair, they have been balanced, and we have attempted to bring forth those witnesses who have been most knowledgeable and directly affected by the programs.

Last July this committee made the commitment that it would conduct a systematic year-long review of OFCCP, with the goal of guiding it back to its assigned mission. That commitment can hardly be construed as a backing away from furthering civil rights for all Americans.

While Tuesday's witnesses presented a wide variety of suggestions as to how we can realize our espoused national goal, there was common commitment on everyone's part to that goal. For example, we heard witnesses point out that the increase in black employment has been the result of not only Executive Order 11246 but due to many efforts, including the enforcement of title 7 by the EEOC and private litigation.

We heard that Congress itself created barriers with the legislation passed, such as the Davis-Bacon Act and others, the minimum wage among others. We heard from the most distinguished sociology professor, Dr. Nathan Blazer, who told us the attitudes of the American people have changed and thus improved opportunities for minorities.

There were many other thoughtful suggestions made, which we will consider along with today's program, which will be incorporated in the committee's program to be deliberated and enacted upon in the future.

We are serious about our commitment to further our goal of improving opportunities for women and minorities. With your help and the untapped goodwill of all Americans, we can realize that goal.

We are very happy to have Senators Nickles and Denton with us this morning. We will turn to Senator Nickles and then Senator Denton.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Thank you, Mr. Chairman.

I would just like to again compliment you for holding these hearings. I think it is vital and important that we make some improvements in an area, the administration of which probably leaves a lot to be desired, according to many persons in the hearings you have held. I think it is important that we do all what we can possibly do to ensure that we do not actually have reverse discrimination, as has been mentioned by some.

I compliment you for the hearings. I look forward to some of the witnesses who will speak today. I do have another conflict that I have to leave on in just a few minutes, but I did want to participate to at least some degree.

The CHAIRMAN. Thank you, Senator. We are glad to have you here.

Senator Denton.

OPENING STATEMENT OF SENATOR DENTON

Senator DENTON. Thank you, Mr. Chairman I appreciate this opportunity also and will be able to stay only briefly, because another subcommittee under your chairmanship of this committee and under my chairmanship as a subcommittee is meeting this morning in a few minutes.

I would like to echo my friend and distinguished colleague from Oklahoma in his compliments to you for your diligent efforts to coordinate this series of hearings on enforcement procedures and regulations of civil rights enforcement agencies. It is a growingly controversial and highly sensitive area, and you are to be congratulated for your thorough, even-handed treatment of the issues involved.

There is no dispute or debate, in my mind, about the necessity for equality of opportunity for employment, education, and all other advantages this country has to offer. The manner in which that is achieved is something that requires fine-tuning to the degree that we are not defeating the purpose of the bill and hurting the regulations and those whom we are trying to help.

Each American is entitled to be evaluated for a job solely on his or her ability. The role of the Federal Government should be to implement policies which should help create that open workplace available to all. Unfortunately, the OFCCP may have been measuring its progress, from testimony we have received, by the amount of employer animosity produced rather than the number of job opportunities created. We need a program that is result oriented.

We have heard criticisms in prior testimony that OFCCP exceeds its authority, it harasses employers, and that it sometimes denies due process. Some suggest that these abuses are correctable. Others argue that the office should be eliminated. What is encouraging to me, Mr. Chairman, is that we are hearing from a broad base of opinions on the matter.

I strongly believe we must look at the employment picture as a whole before making recommendations for reform of the OFCCP. We should keep in mind that the Federal Government should not infringe on anyone's rights to seek a job.

In our zeal to create a better world, we have created a new category of victims of reverse discrimination. That does not mean we should abandon this effort by any means, but we have got to watch for reverse discrimination.

There are practices in addition to discrimination which disproportionately work to the detriment to those who have been unfairly denied employment. Noted economist Walter C. Williams touched on this broad view last Tuesday, when he discussed the failure to teach American youth basic education skills.

This was a subject I have discussed at length in prior hearings and is a matter that has direct bearing on whether youngsters, especially minority youngsters, will be able to qualify for the jobs that should be available to them. I have done as much as I can to add emphasis in terms of Federal aid to that aspect of improving equality of opportunity.

Minimum wage rates and minimum time requirements are certainly barriers that indirectly deny opportunities to those who have the desire to be productive workers. Many times I have pointed out that most of the ladies and gentlemen in this governmental body, the Senate, have worked as youths in part-time jobs for less than minimum wage. In my own case it was a decided distance from my family, who were in dire straits during the Depression. We have a recession now.

I believe it is a waste of manpower, a waste of productivity, a waste of economic opportunity to the families, and it is pennywise, pound-foolish in terms of labor rules to permit some kind of exceptions to minimum wage rates and minimum time requirements.

Inflexible wage and time restrictions not only effectively price out many young people but many elderly people. Population groups that suffer high rates of unemployment would be made more employable and the job vacancies would be considerably eased.

This is not to suggest that increased job opportunities will eliminate discrimination problems for blacks, Hispanics, women, or any other group. However, we should keep in mind that discrimination is only one of several barriers which deny entry or reentry into the job market. These others should be addressed in any comprehensive review of equal participation in the workplace.

I know of no one I would rather have chairing such hearings than you, Mr. Chairman. I am looking forward to reviewing the testimony of today's witnesses, and I offer you my support and cooperation in the work you are doing.

The CHAIRMAN. Thank you, Senator.

We have four panels today. Because of the time constraints, we are going to ask that each representative on each panel limit himself or herself to 6 minutes. The yellow light will come on at 5 minutes and the red light at 6 minutes. That means you will have 1 minute to go when the yellow light in front of the witness table turns on.

On our first panel we have James J. Graham, chairman of the EEO Policy Committee of the Business Roundtable, Washington, D.C. Mr. Graham is manager of special projects for the Exxon Corp.

Michael Warner, attorney with Seyfarth, Shaw, Fairweather & Geraldson of Chicago, Ill., is also on the panel. Mr. Warner is a practicing labor lawyer with over 15 years experience in representing employers in labor and personnel matters.

We are happy to have both of you good gentlemen here today.

I notice Mr. Warner is not here, so I am happy to welcome my good friend Virgil Day along with Mr. Graham. Mr. Warner will be here, I suppose, in a minute or so.

We will, without objection, order at the beginning of these hearings that all formally prepared statements will go into the record in full as though fully read here before the committee. If you could summarize, gentlemen, we would really appreciate it. Thank you.

Mr. Graham.

STATEMENT OF JAMES J. GRAHAM, CHAIRMAN, EEO POLICY COMMITTEE, BUSINESS ROUNDTABLE, WASHINGTON, D.C., ACCOMPANIED BY VIRGIL B. DAY, COUNSEL

Mr. GRAHAM. Thank you, Mr. Chairman.

On behalf of the Roundtable we appreciate very much the opportunity to be here today and would like to add to the comments of your fellow Senators complimenting you on holding these hearings. We really believe strongly that it represents a constructive contribution to improved understanding of what has been going on in equal employment opportunity enforcement, but of perhaps even greater importance, obtaining some insights from a cross-section of the American public on what needs to be done as we, I believe, move into a whole new arena of equal employment opportunity.

We have stated consistently our commitment to the principles of affirmative action. Many of the most productive and innovative affirmative action efforts over the years, such as the national program to encourage and train minorities who enter the engineering profession, have been led by Roundtable companies.

I have a number of other illustrations that I could give, if you would be interested, at some point in time.

We also believe it is important that such affirmative action—as I have just defined that term—efforts continue but also increase in scope and effectiveness in the future.

We believe that equal employment opportunity is at a stage where it is widely accepted across a broad spectrum of our country and certainly American business. Indeed, it is generally acknowledged by most students of human resources management that equal employment opportunity and affirmative action are essential elements for effective employee relations programs and that it is simply sound business management to effectively utilize that vast important resource, human resource—namely, the substantial numbers of minorities and women not currently active in the national work force.

I have looked, and I am sure you have, Senator, and seen a number of long-range manpower supply/demand projections. Those that I have seen indicate a very tight balance of supply and demand over the next 20 years, particularly in the 1990 period.

In general, it is going to be tight. In particular, there are a number of specific skills in which there will be shortages. Your committee has been spending a considerable amount of time identifying that problem and developing plans to deal with it.

Its relevance to the subject of this hearing is that affirmative action directed toward increasing the supply of skilled minorities and women serves the dual purpose of responding to both our Nation's social and economic goals.

On the other hand, the Business Roundtable EEO Policy Committee has made the point on several occasions that many aspects of OFCCP's existing regulations are counterproductive and a serious hindrance in stimulating Federal contractors 'efforts to achieve meaningful affirmative action results for minorities and women.

The essential message in these comments is that the program should be reoriented, so that OFCCP's effectiveness is ultimately demonstrated by increased numbers of minorities and women hired, trained, and promoted as a result of contractors 'good faith efforts rather than by penalties demanded and contractors debarred. This will require a change in OFCCP's current concepts and operation approach.

It is our judgment that the current administration of the Executive order is seriously flawed in two major respects. First, the Agency's pursuit of effective class discrimination issues in obtaining backpay and other title 7 remedies for alleged victims of discrimination has caused it to neglect affirmative action, as I tried to define it earlier.

Related to this dual-tiering problem of overlapping jurisdiction between EEOC and OFCCP has been OFCCP's attempt to apply expanded and inventive definitions of "discrimination" of the Executive order, definitions that go beyond what Congress and the courts have defined as constituting unlawful discrimination under title 7.

Second, the regulations governing affirmative action requirements are so complex and vague as to be impractical and have the effect of representing a disincentive to employers to take action of the affirmative action type I have mentioned. On the other hand, OFCCP's efforts on resulting goals and timetables have led, as I have just mentioned, to an ineffective affirmative action program.

Our committee submitted detailed comments to Secretary of Labor Donovan on September 14 and October 26 with respect to proposed changes to the OFCCP's program, pointing out areas that need to be explored in order to develop a comprehensive reform of current weaknesses in the Executive order program. These may be briefly summarized as follows:

One, they should stress affirmative action achievements and avoid confrontation over retrospective relief.

Two, the requirements for affirmative action need to be simplified and the eight-factor analysis approach changed.

Three, the compliance requirements should be oriented toward that similar to what the IRS has in place—namely, sequential audits.

Four, the current threshold provisions, which they are suggesting be changed, we believe should continue. It is with many of these small employers that some of the new hires are going to take place in the future.

In the interests of time, Senator, I would like to briefly summarize my comments by suggesting that the key question before us is whether the Office of Federal Contract Compliance Programs should concentrate on future conduct by Government contractors or whether it should continue to duplicate the efforts of EEOC and private plaintiffs.

Where we come down is that a program oriented toward the future is the best course. It is one where we back away from a situation of confrontation over discrimination charges and emphasize affirmative action of the type I tried to identify earlier.

Thank you.

The **Chairman**. We hear constant criticism from some civil rights advocates that if it were not for the enforcement efforts of the OFCCP of Executive Order 11246 the business community would "continue their racist and sexist practices." How would you respond to that criticism?

Mr. **Graham**. I would respond to it this way. Of course I do not agree with that, and the reason I do not is, first of all, the concept of equal employment opportunity is now ingrained, in my opinion, in the broad spectrum of American business, and there is a self-interest in it as a matter of fact, which I tried to allude to earlier.

Any manpower forecast that you will look at says that we are going to be in a tight situation in the 1990–2000 period, and so there is a self-interest, if you will, aside from a social awareness of the issue. There is a self-interest that those groups be utilized.

How do you allocate your resources to be sure that minorities and women find their place in the workplace? You can utilize them through a series of legal battles, arguments over regulations, and confrontations with agencies, or you can utilize those resources to increase the pool supply of trained minorities who will be needed to meet our Nation's manpower needs in the future.

The **Chairman**. What assurance can you give the critics of the business community that the business community will take a leadership role, making good-faith efforts to increase employment opportunity for minorities and women?

Mr. **Graham**. The only insurance that you really can give, Senator, it seems to me, is primarily based upon, in many cases, the record that certainly many of the leading business organizations have demonstrated in the past.

What I would suggest is that probably the most constructive affirmative action efforts that have occurred over the past 5 years are those that have been promoted voluntarily. Admittedly there is some self-interest there, as I alluded to earlier.

This minority engineering program that I mentioned is a good example. There are a number of similar programs in various communities throughout the United States. I personally was involved in forming one in Houston, Tex., which took young minorities in the public school system who happened to have an inclination toward technical education, which is of high demand in our country and where the supply of minorities and women has been very low. We have identified those in the public high schools and put them in a 4-year summer program in one of the better, technically speaking, private schools.

That program has been in existence now for about 4 years, and the product is that those young people are finding their way into the better engineering schools, graduating, being helped during their high school careers, helped to get into an outstanding college, and then helped through their college careers to find positions in their professions.

I just use that to illustrate—not to suggest that is the only one, because it is not—the kinds of things that are going on.

I believe that type of thing would go on to a much greater extent if the OFCCP program was oriented toward that, oriented toward efforts to increase the supply of minorities and women in the pool, so that they will be eligible and qualified to take the opportunities in the future.

The opportunity is going to be there. The only question, I think, is, are we going to allocate our resources in the private sector, encouraged by Government, to increase the pool of qualified minorities and women?

The desire to hire them is there, I believe. I am convinced of that. The real issue is to get the pool increased. The manpower studies that you have undertaken point out that the supply is going to be tight but the job requirements are going to be much higher in the future. I think these hearings you are conducting on OFCCP and the hearings you are conducting on manpower forecasts are inextricably interrelated.

[The prepared statement of Mr. Graham and material supplied for the record follow:]

TESTIMONY
OF
BUSINESS ROUNDTABLE EEO POLICY COMMITTEE

GOOD MORNING, SENATOR HATCH. MY NAME IS JAMES J. GRAHAM. I AM MANAGER OF SPECIAL PROJECTS, EXXON CORPORATION, AND APPEARING HERE TODAY AS CHAIRMAN OF THE BUSINESS ROUNDTABLE EQUAL EMPLOYMENT COMMITTEE. I AM ACCOMPANIED BY VIRGIL B. DAY, COUNSEL TO THAT COMMITTEE.

WE WELCOME THIS OPPORTUNITY TO RESPOND TO THE CHAIRMAN'S REQUEST FOR COMMENTS AND RECOMMENDATIONS WITH RESPECT TO THE OPERATION OF THE OFFICE OF FEDERAL CONTRACT COMPLICANCE PROGRAMS AS WELL AS OUR VIEWS ON THE FUTURE DIRECTION OF EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS.

THE BUSINESS ROUNDTABLE HAS CONSISTENTLY STATED ITS COMMITMENT TO THE PRINCIPLES OF AFFIRMATIVE ACTION. MANY OF THE MOST PRODUCTIVE AND INNOVATIVE AFFIRMATIVE ACTION EFFORTS, SUCH AS THE NATIONAL PROGRAM TO ENCOURAGE AND TRAIN MINIORITIES TO ENTER THE ENGINEERING PROFESSION, HAVE BEEN LED BY ROUNDTABLE COMPANIES. IT IS IMPORTANT TO OUR SOCIETY THAT SUCH EFFORTS NOT ONLY CONTINUE BUT INCREASE IN SCOPE AND EFFECTIVENESS. EQUAL EMPLOYMENT OPPORTUNITY IS A WIDELY ACCEPTED PRINCIPLE ACROSS A BROAD SPECTRUM OF AMERICAN BUSINESS. INDEED, IT IS GENERALLY ACKNOWLEDGED BY MOST STUDENTS OF HUMAN RESOURCES MANAGEMENT THAT EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION ARE ESSENTIAL ELEMENTS FOR EFFECTIVE EMPLOYEE RELATIONS PROGRAMS, AND THAT IT IS SIMPLY SOUND BUSINESS MANAGEMENT TO UTILIZE MOST EFFECTIVELY THE SUBSTANTIAL NUMBER OF MINORITIES AND WOMEN IN

THE NATIONAL WORKFORCE. IN FACT, MOST LONG RANGE MANPOWER SUPPLY/ DEMAND PROJECTIONS I HAVE SEEN INDICATE A TIGHT BALANCE, IN GENERAL, AND VARIOUS SKILL SHORTAGES, IN PARTICULAR, DURING THE 1990 PERIOD AND BEYOND. I KNOW, SENATOR HATCH, YOUR COMMITTEE HAS BEEN LOOKING INTO THIS PROBLEM. ITS RELEVANCE TO THE SUBJECT OF THIS HEARING IS THAT AFFIRMATIVE ACTION DIRECTED TOWARDS INCREASING THE SUPPLY OF SKILLED MINORITIES AND WOMEN SERVES THE DUAL PURPOSE OF RESPONDING TO BOTH OUR NATION'S SOCIAL AND ECONOMIC GOALS. ON THE OTHER HAND, THE BUSINESS ROUNDTABLE EEO POLICY COMMITTEE HAS MADE THE POINT, ON SEVERAL OCCASIONS, THAT MANY ASPECTS OF OFCCP'S EXISTING REGULATIONS ARE COUNTERPRODUCTIVE AND A SERIOUS HINDRANCE IN STIMULATING FEDERAL CONTRACTORS' EFFORTS TO ACHIEVE MEANINGFUL AFFIRMATIVE ACTION RESULTS FOR MINORITY GROUPS AND FEMALES.

THE ESSENTIAL MESSAGE IN THESE COMMENTS IS THAT THE PROGRAM SHOULD BE RE-ORIENTED SO THAT OFCCP'S EFFECTIVENESS IS ULTIMATELY DEMONSTRATED BY INCREASED NUMBERS OF MINORITIES AND WOMEN HIRED, TRAINED, AND PROMOTED AS A RESULT OF CONTRACTORS' GOOD FAITH EFFORTS RATHER THAN BY PENALTIES DEMANDED AND CONTRACTORS DEBARRED. THIS WILL REQUIRE A CHANGE IN OFCCP'S CURRENT CONCEPTS AND OPERATIONAL REALITIES.

THE CURRENT ADMINISTRATION OF THE EXECUTIVE ORDER PROGRAM IS SERIOUSLY FLAWED IN BOTH CONCEPT AND PRACTICE. KEY ASPECTS OF THE MAJOR PROBLEMS, WHICH HAVE BEEN STATED WITH ELOQUENCE AND FREQUENCY BY NUMEROUS OBSERVERS OF THE EXECUTIVE ORDER PROGRAM, STEM FROM TWO FEATURES OF CURRENT OFCCP PRACTICE.

FIRST, THE AGENCY'S PURSUIT OF "AFFECTED CLASS" DISCRIMINATION ISSUES AND OBTAINING BACK PAY AND OTHER TITLE VII REMEDIES FOR ALLEGED VICTIMS OF DISCRIMINATION HAS CAUSED IT TO NEGLECT AFFIRMATIVE ACTION, WHICH SHOULD BE ITS MAJOR ORIENTATION AND AREA OF EMPHASIS, IN FAVOR OF CONFRONTATIONAL WRANGLES WITH CONTRACTORS OVER MATTERS THAT CONGRESS SAW FIT TO PLACE IN THE HANDS OF EEOC AND THE FEDERAL COURTS UNDER TITLE VII AND THE EQUAL PAY ACT. RELATED TO THIS "DUAL TIERING" PROBLEM OF OVERLAPPING JURISDICTION BETWEEN EEOC AND OFCCP HAS BEEN OFCCP'S ATTEMPT TO APPLY EXPANDED AND INVENTIVE DEFINITIONS OF DISCRIMINATION UNDER THE EXECUTIVE ORDER, DEFINITIONS THAT GO BEYOND WHAT CONGRESS AND THE COURTS HAVE DEFINED AS CONSTITUTING UNLAWFUL DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT.

SECOND, THE REGULATIONS GOVERNING AFFIRMATIVE ACTION REQUIREMENTS ARE COMPLEX AND SO VAGUE AND IMPRACTICAL THAT THE PAPERWORK BURDEN ON MOST EMPLOYERS HAS REACHED DISTURBING LEVELS. YET OFCCP'S EMPHASIS ON THE RESULTING GOALS AND TIME-TABLES HAS LED TO A NEGLECT OF MEANINGFUL ENCOURAGEMENT OF EMPLOYERS' "GOOD FAITH" AFFIRMATIVE ACTION EFFORTS.

THE BRT EEO POLICY COMMITTEE SUBMITTED DETAILED COMMENTS TO SECRETARY OF LABOR DONOVAN, ON SEPTEMBER 14 AND ON OCTOBER 26, WITH RESPECT TO PROPOSED CHANGES TO THE OFCCP PROGRAMS, POINTING OUT AREAS THAT NEED TO BE EXPLORED IN ORDER TO DEVELOP A COMPREHENSIVE REFORM OF CURRENT WEAKNESSES IN THE EXECUTIVE ORDER PROGRAM. COPIES OF THESE DOCUMENTS HAVE BEEN FILED WITH THE COMMITTEE.

THESE MAY BE BRIEFLY SUMMARIZED AS FOLLOWS:

- OFCCP SHOULD STRESS AFFIRMATIVE ACTION ACHIEVEMENTS AND SHOULD AVOID CONFRONTATIONS OVER RETROSPECTIVE RELIEF (INCLUDING BACK PAY) REFERRING ALL DISCRIMINATION MATTERS TO OTHER APPROPRIATE FEDERAL EEO AGENCIES. THIS WILL ALSO ELIMINATE THE PROBLEM OF CONFLICTING INTERPRETATIONS OF DISCRIMINATION STANDARDS BY OFCCP AND OTHER AGENCIES AND ELIMINATE "DUAL TIERING."
- AFFIRMATIVE ACTION REQUIREMENTS SHOULD BE SIMPLIFIED AND STRENGTHENED THROUGH PERMITTING ABBREVIATED AAPs FOR ALL CONTRACTORS, USING REALISTIC CRITERIA INSTEAD OF THE CURRENT EIGHT AVAILABILITY FACTORS, ELIMINATING TIMETABLES AND ULTIMATE GOALS, AND OTHERWISE FOCUSING ATTENTION ON OVERALL DOCUMENTED GOOD FAITH EFFORTS AND ANNUAL ACHIEVEMENTS.
- THE COMPLIANCE REVIEW PROCEDURE SHOULD BE REMODELED ALONG THE SEQUENTIAL LINES OF AN INTERNAL REVENUE SERVICE AUDIT IN ORDER TO ALLOW LESS BURDENSOME, MORE FREQUENT REVIEWS OF MORE CONTRACTORS AND TO CREATE ADDITIONAL INCENTIVES FOR COMPLIANCE THROUGH PROCEDURES THAT SELECT THE WORST PERFORMERS FOR REVIEWS RATHER THAN THE BEST.
- CURRENT THRESHOLDS FOR EXECUTIVE ORDER COVERAGE AND WRITTEN AAP DEVELOPMENT SHOULD REMAIN THE SAME, BUT UNNECESSARILY BURDENSOME ASPECTS OF COMPLIANCE REQUIREMENTS SHOULD BE ELIMINATED, ESPECIALLY FOR SMALL CONTRACTORS.

- THE EXTENDED AAP CONCEPT IN WHICH EXEMPTIONS FROM COMPLIANCE REVIEWS IS USED AS AN INCENTIVE FOR THE PERFORMANCE OF UNUSUAL EEO EFFORTS SHOULD BE FURTHER EXPLORED
- CONTRACTOR CONFIDENCE IN OFCCP'S GOOD INTENTIONS WOULD BE GREATLY ENHANCED BY STRICTER SAFEGUARDS FOR CONFIDENTIALITY OF DATA. REVISION OF THE "FOIA" REGULATIONS {41 CFR PART 60-40} IS IMPERATIVE.

IT IS WITHIN THE CONTEXT OF OUR DESIRE TO SEE A COMPREHENSIVE PROGRAM OF REFORM, EMPHASIZING OFCCP'S ROLE AS AN AFFIRMATIVE AID IN ACHIEVING EEO RESULTS RATHER THAN AS A PROSECUTOR, THAT OUR COMMENTS ON PROPOSED CHANGES TO OFCCP'S RULES WERE MADE.

I WOULD LIKE TO BRIEFLY SUMMARIZE MY COMMENTS BY SUGGESTING THAT THE KEY QUESTION BEFORE US IS WHETHER THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAM SHOULD CONCENTRATE ON PRESENT AND FUTURE CONDUCT BY GOVERNMENT CONTRACTORS {A PROSPECTIVE FOCUS} OR WHETHER IT SHOULD CONTINUE TO DUPLICATE THE EFFORTS OF EEOC AND PRIVATE PLAINTIFFS IN PROVIDING REMEDIES FOR THE EFFECTS OF PAST DISCRIMINATION. THE FORMER WOULD EMPHASIZE AFFIRMATIVE STEPS TO BRING WOMEN AND MINORITIES INTO THE WORKPLACE AND TO PROVIDE THEM WITH THE REQUISITE SKILLS TO TAKE ADVANTAGE OF JOB OPPORTUNITIES AND ACHIEVE TRUE EQUALITY IN THE WORK FORCE. THE CURRENT PROGRAM EMPHASIZES PAST DISCRIMINATION. IT DUPLICATES REMEDIES AVAILABLE UNDER TITLE VII AND, THROUGH USE OF BACKPAY AND AFFECTED CLASS ALLEGATIONS, ATTACKS PAST CONDUCT NOT UNLAWFUL UNDER EXISTING STATUTES.

A PROGRAM ORIENTED TOWARD THE PRESENT AND THE FUTURE WOULD SHIFT THE EMPHASIS TO A COOPERATIVE EFFORT TO ACHIEVE EQUAL OPPORTUNITY. IT WOULD CHANNEL FUNDS INTO PROGRESS INSTEAD OF ADVERSARY PROCEEDINGS - PROGRESS WHICH COULD BE MEASURED BY NEW HIRES AND PROMOTIONS INSTEAD OF BY CONTRACTORS DEBARRED AND DOLLARS COLLECTED.

THANK YOU FOR THE OPPORTUNITY OF APPEARING HERE TODAY. MR. DAY AND I WILL BE PLEASED TO ANSWER ANY FURTHER QUESTIONS YOU MIGHT HAVE.

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WRITER'S DIRECT DIAL NUMBER

January 19, 1982

Mr. John Florez
Senate Committee on Labor & Human Resources
Room 4220
Dirksen Senate Office Building
Washington, D.C. 20510

Re: Statement of Harris Trust & Savings Bank

Dear John:

I am enclosing a copy of a letter to Senator Hatch from John Stephens, Executive Vice President of Harris Trust & Savings Bank, along with a statement on behalf of the Bank setting the record straight with respect to inaccurate and irresponsible statements made by one witness in the December 10 testimony.

The statement speaks for itself as to the Bank's leadership role in seeking to provide equal employment opportunity. It also details the history of gross abuses of government authority by OFCCP in the Harris case which is currently pending before the Secretary of Labor.

A copy of this document is also being sent to Mr. James W. Powell, Editor, Senate Committee on Labor and Human Resources, with a request that it be included in the Record of these Oversight Hearings.

Sincerely,

Virgil B. Day

VBD:nb
Enc.
cc: Mr. James W. Powell, Editor
Senate Committee on Labor & Human Resources
4230 Dirksen Building
Washington, D.C. 20510

John L. Stephens
Executive Vice President

HARRIS
BANK

January 19, 1982

Re: Senate Labor & Human Resources
Committee--OFCCP Oversight Hearing

Dear Senator Hatch:

We sincerely appreciate the opportunity your Committee has accorded Harris Trust and Savings Bank to respond to the statements relating to the Bank made by a representative of Women Employed before your Committee last month.

The Bank's response, which is enclosed, sets forth a brief history of the actions engaged in by OFCCP during the course of its enforcement proceedings against the Bank. Contrary to the OFCCP's assertion, the Bank has been a leader in its efforts to insure equal employment opportunity.

Sincerely yours,

The Honorable Orrin G. Hatch
Chairman, Senate Labor & Human
Resources Committee
United States Senate
Washington, D. C. 20510

Enclosure

(Editor's note: In the interest of economy, appendices to Mr. Stephen's letter were retained in the files of the committee where the material may be researched upon request.)

The **Chairman**. Thank you.

I notice Mr. Warner is here.

Mr. Warner, we have already introduced you in absentia. Let us turn to you. We are only allowing 6 minutes. When the yellow light goes on you have 1 minute left. But we are putting full statements into the record as though fully read, and we know that you have put forth a great deal of effort in preparing your statement, as well as the other witnesses here today, so we will see that that is included in the record.

STATEMENT OF MICHAEL A. WARNER, ESQ., ATTORNEY, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, CHICAGO, ILL.

Mr. **Warner**. Thank you. I appreciate the opportunity of sharing my views on the subject of these hearings with you.

Given the topic of these hearings, the issue of employment opportunities for minorities and females, as a practicing labor lawyer, I would also like to emphasize at the outset that in my view it is naive to assume that the enforcement of the antidiscrimination laws standing alone can erase all the differences in employment participation levels and income disparities of different groups.

To the extent that the statistical disparities upon which so much of the EEO enforcement effort is based are the product of historical and societal factors over which the employer has little or no control, it is wrong and often counterproductive, in my view, to premise enforcement of the laws on the assumption that the disparity is solely the result of employment discrimination.

Thus my comments, as detailed in my written testimony, are directed at a realistic appraisal of where, in my view, is the capacity of the antidiscrimination laws to contribute to increasing employment opportunities.

To summarize my overall conclusions on the role of the antidiscrimination laws they are:

One, employers should expect nothing less than vigorous enforcement of the antidiscrimination laws, but this enforcement must be rational and realistic if it is to be truly effective and credible.

The awarding of relief to specifically identified victims of proven discrimination in the form of rights to future vacancies is fully consistent with the antidiscrimination laws. While such awards could be characterized as quotas, they may and should be recognized as permissible legal remedies to place the victims of employers' discrimination into their rightful place.

On the other hand, to disregard the relative merit of employees and to make employment decisions by granting preferential treatment on the basis of race, sex, and other protected group status in order to change alleged statistical imbalances is, in my opinion, wrong constitutionally, legally, and the adverse consequences falling from such quota and preferential-based decisionmaking more than cancel out any benefits which may be derived.

Four, while affirmative action has in recent years become known as a process of race- and sex-based preferential decisionmaking without regard to merit, the original purpose of affirmative action, to take affirmative steps to insure equal treatment, is a valid and important concept which should not be submerged under the now-accepted practice to define affirmative action solely in the context of quotas and preferences.

While arbitrary and artificial barriers to minority and female employment should be eliminated, there must be a reversal of the Government's policy of setting standards for acceptable selection criteria at such a level that employers are forced to eliminate fair and reasonable merit selection systems in favor of random or quota selections.

Six, the uniform selection guidelines, which are so rigid that to develop a new selection system is effectively discouraged, must be substantially revised so as to encourage employers to develop new systems in order to improve the quality of selection and thereby employer productivity to the benefit of all employees.

As far as procedural reforms are concerned, I suggest in my written testimony and another attachment that I have filed with the committee that the Executive order program, which has been marked by reckless disregard of congressional intent and unnecessary and inefficient duplication of effort, is in need of substantial reform.

Perhaps one matter I attempt to bring out in my written testimony that I do not believe, from reviewing other statements before this committee, has been fully emphasized enough is the effect that misguided enforcement, in my opinion, has had on overall employee productivity.

The tendency of the agencies to rely solely on statistical disparities as their means of enforcement, their tendency to place such rigid rules on what employers can safely use as selection devices, has had, in my view, a tremendous impact on productivity, because it has in effect put employers in the position that they are unable to rely on any of the traditional criteria that they have used to select employees.

We are only now realizing the full effect of this, but it has had a profound effect. Various recent studies by groups that are now finding ways to measure this have estimated that this is causing our economy losses of up to $100 billion a year. This is to the benefit of neither the majority nor the minority, and it is one area that I think particularly this committee should focus on.

Thank you very much.

[The prepared statement of Mr. Warner follows:]

TESTIMONY OF MICHAEL A. WARNER, ESQ.
REGARDING EQUAL EMPLOYMENT
OPPORTUNITY LAW REFORM
BEFORE THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

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TESTIMONY OF MICHAEL A. WARNER, ESQ.
REGARDING EQUAL EMPLOYMENT
OPPORTUNITY LAW REFORM
BEFORE THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

I. INTRODUCTION

Mr. Chairman. Thank you for inviting me to share my views on the subject of how best to realize our national goal of improving employment opportunities.

I have been in the private practice of law for over 15 years and during the last 12 years I have actively represented employers in labor and personnel matters, with a heavy emphasis on employment discrimination matters. This has given me the opportunity to observe most immediately and specifically the development of the law and enforcement trends in this most controversial area. It has also allowed me to observe at extremely close hand the actual day-to-day effects of the enforcement of the employment discrimination laws on numerous employers of all types and sizes and in a variety of industries. Indeed, because my practice brings me into immediate and continual contact with line management decision makers and employees who experience the direct effect of these laws on a daily basis, I hope I can give some practical, day-to-day meaning to the issues which have been so ably debated by the other witnesses who have appeared before you.

Given the overall topic of these hearings and my experience under the anti-discrimination laws, I must observe at the outset that while it should be the objective of the anti-discrimination laws to ensure equal opportunity among those of comparable qualifications and abilities, it is naive to assume that the enforcement of those laws standing alone can erase all of the differences in employment participation levels and income among different groups. To the extent that the statistical disparities upon which so much of the EEO enforcement effort is based are the product of historical and societal factors over which the employer has little or no control, it is wrong, indeed often counterproductive, to premise enforcement of the laws on the assumption that the disparity is solely the result of employment discrimination. Thus, for example, as Thomas Sowell, the Black economist, notes in Ethnic America (Basic Books, Inc.) at pp. 290-91:

> While clear instances of discrimination have been encountered by many ethnic groups at various periods in their history, determining how much of the group differences in income, occupation or housing represent discrimination is a complex and uncertain process. The very meaning of discrimination varies across a spectrum, from underpaying individuals for their current capabilities to the existence of historic barriers that inhibited the development of capabilities. Employer discrimination as an explanation of current income differences usually means that a given group is underpaid relative to its current capabilities. Historical and current empirical evidence on this point is far from conclusive, despite the axiomatic certainty of many assertions.

Similarly, as the Black economist, Bernard Anderson, wrote in "The State of Black America 1980":

> Race discrimination alone is not the only barrier to greater economic opportunity, and little will be gained by failing to confront the issues raised by the changing domain of opportunity for the better prepared black workers, as compared with others who because of persistent unemployment, poor education, poor housing, negative attitudes toward work and toward society at large have become increasingly isolated from economic progress.

Quoted in Auletta, "The Underclass-III," The New Yorker, November 30, 1981, at p. 134.

Thus, if our national goal of improving employment opportunities for women and minorities is to be realized, one must look at many factors and programs beyond the anti-discrimination laws for solutions. The purpose of my testimony, however, is to provide a realistic appraisal of the capacity of the anti-discrimination laws to contribute to increasing employment opportunities. In so doing, I hope I can convince you to share my increasing disenchantment with the many enforcement trends which have had a substantial adverse effect on business productivity and efficiency, and which have not served the objectives of Congress in enacting anti-discrimination laws.*/

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*/ This testimony incorporates in substantial part testimony presented by Michael A. Warner regarding Affirmative Action and Equal Protection before the Subcommittee On The Constitution of the Senate Judiciary Committee on July 16, 1981.

At the risk of overgeneralization, I will attempt to summarize my overall conclusions with respect to the substantive policies which should govern the equal employment opportunity effort:

(1) Employers should expect nothing less than vigorous enforcement of the anti-discrimination laws but this enforcement must be rational and realistic if it is to be truly effective and credible.

(2) The awarding of relief to specifically identified victims of proven discrimination in the form of rights to future vacancies is fully consistent with the anti-discrimination laws. While such awards might be characterized as quotas, they may and should be recognized as permissible legal remedies to place the victims of an employer's discrimination into their "rightful place" -- the positions they would have held "but for" the employer's discrimination.

(3) On the other hand, to disregard relative merit and to make employment decisions by granting preferential treatment on the basis of race, sex or other protected group status in order to change alleged statistical imbalances in the work force is wrong legally, constitutionally and morally, and the adverse consequences flowing from such quota and preferentially-based decision making more than cancel out any benefits which may be derived.

(4) While "affirmative action" has in recent years become a process of race and sex based preferential decision making without regard to merit, the original purpose of affirmative action -- to take affirmative steps to ensure "equal treatment" -- is a valid and important concept which should not be submerged under the now accepted practice to define affirmative action solely in the context of quotas and preferences.

(5) While arbitrary and artificial barriers to minority and female employment should be eliminated, there must be a reversal of the government's policy of setting standards for acceptable selection criteria at such a level that employers are forced to eliminate fair and reasonable merit selection systems in favor of random or quota selections.

(6) The Uniform Selection Guidelines, which are so rigid that the development of new selection systems is effectively discouraged, must be substantially revised so as to encourage employers to develop new systems in order to improve the quality of selection and thereby employee productivity.

The principal procedural reforms I would suggest concern the Executive Order program which has been marked by a reckless disregard of Congressional intent and an unnecessary and inefficient duplication of effort. While strong arguments can be made for eliminating the contract compliance program in its entirety, at the minimum, a new Executive Order should be issued incorporating the following reforms:

(a) Specifically limit the substantive scope of the contract compliance program to the bounds of Title VII.

(b) Limit the coverage of the Executive Order program to those facilities actually involved in prime government contracts.

(c) Refer all charges of individual or systemic discrimination to the EEOC for investigation and prosecution.

(d) Provide that the Title VII procedures are the exclusive means for seeking monetary and other retroactive relief and that the OFCCP is prohibited from seeking such remedies.

(e) Require the OFCCP to establish a more reasonable and relevant method of determining the availability of protected group members.

(f) Eliminate numerical objectives or establish a more reasonable method of determining when to invoke goals and time tables.

II. QUOTAS, PREFERENCES AND THE DISMANTLING OF MERIT SELECTION SYSTEMS AS A SYMPTOM OF MISGUIDED ENFORCEMENT CHOICES

A. The Rise Of The Statistical Parity Theory Of Enforcement And Its Effect On Productivity

It is imperative to recognize at the outset that quotas and preferences and the dismantling of merit selection systems are seldom the result of direct government fiat, rather they are a symptom of the way the nondiscrimination laws have come to be enforced. It is now common for the enforcement agencies to rely almost exclusively on the theory that discrimination will be presumed based solely upon a finding of a statistical underrepresentation of protected group members in a particular employer's work force as compared to the percentage of protected group members in the labor force generally. But invariably these findings are made by failing to even consider the many factors other than employer discrimination which may explain the statistical disparity. Although the Supreme Court has warned the lower courts of the potential danger of an undue reliance on statistics, the enforcement agencies have paid little attention to these warnings and many courts, taking their cue from the enforcement agencies, continue to find discrimination based on statistical presumptions which are contrary to traditional legal notions on the reliability of statistics and which overlook direct evidence contrary to the statistical inference relied upon.

At the same time, rigid and unrealistic rules and guidelines have been established which unnecessarily undercut an employer's ability to rely upon traditional merit selection criteria in order to determine the most qualified applicants. The result is to put a premium on achieving statistical parity at all costs. Employment managers, in order to perfect their "bottom line" numbers, are pressured to abandon merit selection in favor of random selection or preferential selection based upon race, ethnic and sex quotas.

This shift of emphasis has had a profound adverse impact upon the productivity of American workers. Although this productivity loss has gone largely unnoticed because it occurred only in difficult-to-measure increments, the magnitude of the loss is emphasized by a recent study which conservatively estimates that an annual productivity increase of between $43 billion and $75.7 billion could be achieved the first year if all U.S. employers adopted ability-based selection standards.*/ Everyone agrees that the key to maximum employment opportunity for all workers is a viable and prospering economy. Accordingly, it is submitted that EEO policy makers can no longer avoid the effect that past enforcement choices have had in undercutting an employer's capacity to hire, promote and compensate employees in a manner which will maximize productivity.

Without significant reform in the enforcement of the anti-discrimination laws, I do not see any realistic possibility that the increasing trends towards the routine use of race and sex preferences or random selection, to the detriment of merit selection, can be halted. Before particularizing the reforms which I believe must be considered, however, it is important to understand fully how we reached the current state of enforcement.

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*/ Hunter, K. E. and Schmidt, F. L., "Fitting People to Jobs: The Impact of Personnel Selection on National Productivity," Human Performance and Productivity (Fleishman, E. A., ed.) (November 1981).

B. The Legal Principles Applicable To Statistical Analysis In The Enforcement Of Title VII

It should be recognized that Congress in passing Title VII of the Civil Rights Act in 1964 sought in the most specific words possible to prohibit reliance on the statistical parity theory because it expressly forecasted that the inevitable effect of such an approach would be to require employers to hire on the basis of race. For example, Section 703(j) of Title VII (42 U.S.C. § 2000e-2(j)) expressly states that "[n]othing contained in this title shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group ... on account of an imbalance which may exist with respect to the total number or percentage of persons of any race ... employed by the employer ... in comparison with the total number or percentage of such race ... in any ... area ... or in the available work force in any ... area." (Emphasis added.) As this provision was explained in the legislative history:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be would involve a violation of Title VII because maintaining such balance would require an employer to hire or to refuse to hire on the basis of race.

Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senators Clark and Case. Floor Managers, 110 Cong. Rec. 7212, 7213 (1964).

How did it happen, therefore, that the achievement of statistical balance became so paramount? The original emphasis was, of course, on breaking down then-rigid barriers to inority and female employment and to eliminate overt bias from employment decision making. However, as enforcement progressed, the emphasis became centered on alleged "patterns" of discrimination and otherwise neutral "systems" which allegedly resulted in "discriminatory effects." The use of statistics as an analytical tool became increasingly important, although originally by no means a device supporting the proposition that race and sex preferences are justifiable.

Thus, for example, in the landmark case of Griggs v. Duke Power Company, 401 U.S. 424 (1971), the Supreme Court held that, based on an analysis of the adverse effect of high school education and testing requirements for entry level positions, a selection criteria may be illegal if it has a disparate effect on minorities and it "cannot be shown to be related to job performance." But it was clear that, in so ruling, the Court did not intend to suggest that relevant job-related merit criteria be eliminated solely to achieve statistical parity. On the contrary, the case was simply a mandate to eliminate artificial and arbitrary barriers so that true merit among the competing applicants would will out. Thus, for example, the Court, in explaining its decision, stated the objective of Title VII simply and succinctly as follows:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

401 U.S. at 431. Then, for good measure, the Court added:

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.

401 U.S. at 436.

The Supreme Court also suggested that statistics may be relevant circumstantial evidence in a discriminatory treatment case but cautioned that they could not be given determinative weight. Thus, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court stated:

> [S]tatistics ... may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern and practice of discrimination against blacks.

411 U.S. at 805. But the Court cautioned that while general determinations based on the racial composition of the employer's work force may be helpful, they "may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." 411 U.S. at 805, n. 19.

The next significant statements by the Supreme Court on the role of statistics occurred in the case of Teamsters v. United States, 431 U.S. 324 (1977), which the statistical parity proponents often point to as supporting their heavy reliance on statistics. But, at most, that case only suggests that a "long lasting and gross disparity" might be a "telltale sign" of purposeful discrimination. The overall burden on the government to establish liability remains consistent with normal legal principles -- *i.e.*, the government must show "by a preponderance of the evidence that racial discrimination was the company's standard operating procedure -- the regular rather than the unusual practice." 431 U.S. at 336. In addition, the Court expressly warned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 431 U.S. at 339-340. Moreover, in Teamsters, the statistical evidence was substantiated by testimony of individuals who recounted 40 specific instances of discrimination which "brought the cold numbers convincingly to life." Finally, the Court held that, although general injunctive relief may be granted if a discriminatory policy is proven, before relief can be awarded to the alleged "victims" of the policy, there must be a showing of injury "with respect to each specific individual, at remedial hearings conducted by the District Court."

Surely, there is nothing in this which would suggest that statistical parity is the basic objective of Title VII or that preferences for persons not shown to be victims of discrimination is either required or permitted. Despite these warnings, however, the EEOC, having been given the invitation, continues to press in Title VII cases the slogan that "figures speak and courts listen" and routinely issues administrative decisions based on little more than statistical presumptions of questionable validity and without any other supporting evidence. Moreover, unless the trial courts are particularly careful in their analysis, rather than to make a full and fair qualitative analysis of an employer's EEO posture they often take the easiest way out and accept superficial statistical showings by the plaintiff as virtually determinative. In effect, this unfairly shifts the entire burden to the employer to prove its innocence, often a most expensive, time consuming and risky proposition. Thus, the message is sent loud and clear. If an employer wants to avoid enforcement based upon a perceived disparity in its numbers, it must do whatever is necessary to achieve statistical parity even if it means employing race and sex preferences to that end.

C. The Government Challenge To Traditional Merit Criteria

As noted, in Griggs v. Duke Power Company, 401 U.S. 424 (1971), the Supreme Court held that a selection procedure, even though neutral on its face and not implemented with an intent to discriminate, may be illegal if it has a disparate effect on minorities and it "cannot be shown to be related to job performance." As the result of unreasonable interpretations and unnecessarily rigid guidelines, the enforcement agencies have set compliance standards of what they will accept as sufficient evidence of "job relatedness" which are virtually impossible for employers to meet in most contexts.

The inevitable result is to again force employers to abandon what might well be the most fair and valid merit selection criteria in favor of random or quota selection.

These government standards are principally embodied in the "Uniform Guidelines On Employee Selection Procedures" which were issued in their most recent form in 1978 by the Equal Employment Opportunity Commission, the U.S. Department of Labor, the Justice Department and the U.S. Civil Service Commission. The first difficulty with the Guidelines is that many of the potential statistical fallacies discussed in the proceeding section are incorporated in those sections dealing with the rules for determining adverse impact. Second, if a statistical disparity is shown, the Guidelines require that "job relatedness" be established through formal "validation studies" to be conducted according to very rigid standards.

Many experts in the field have criticized the Guidelines as overly rigid, based on false premises and, in many cases, impossible to meet. Moreover, because in most cases the requisite validation studies would require expensive empirical studies of large groups of employees, most employers, particularly small employers, find that to attempt to comply with the Guidelines is totally impractical or economically unjustifiable.

In addition to the foregoing challenge to traditional objective selection criteria, invariably employers in filling supervisory, managerial and other higher level jobs must employ selection criteria which can be characterized as "subjective." However, the enforcement agencies generally take the position that if the selectors are predominantly non-minority, the use of subjective criteria is _per se_ illegal. The only apparent basis for this is the assumption that whites will _always_ be biased against minorities. There are no studies which support such a _per se_ test and, indeed, this type of reckless conclusion evidences the same type of racial stereotyping that the laws are intended to prevent.

D. The Concentration On Numbers And Ratios In Enforcing The Executive Order

Although, as noted, enforcement under Title VII has accelerated the momentum towards numerically based preferences, the concentration upon numbers has become almost fanatical under Executive Order 11246 which prohibits employment discrimination and imposes affirmative action requirements on government contractors and subcontractors.

It should be recognized initially, however, that Executive Order 11246, itself, cannot be reasonably interpreted as authorizing race or sex conscious preferences. On the contrary, the Order's invocation of "affirmative action" is specifically linked to efforts to ensure nondiscrimination, not preferential treatment. In fact, the operable language in Section 202(1) of the Order specifically states that:

> [T]he contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. (Emphasis supplied.)

Thus, as originally conceived and implemented, affirmative action programs concentrated on affirmative steps to ensure equal treatment. This included such matters as affirmatively communicating to all employees the employer's commitment to equal employment, counselling and training supervisors on their EEO responsibilities and obligations, reviewing and changing policies and procedures which had an unnecessary adverse effect or might lead to biased decision making, affirmatively recruiting minorities and females to increase the selection pool, encouraging protected group members to seek out opportunities, and counselling minorities and females on the means for increasing their skills and abilities so as to enhance their advancement potential. All of these programs are consistent both with true nondiscrimination and merit selection because they are all designed to ensure that the protected groups develop their potential to the maximum and that when they compete for opportunities, impermissible considerations of race and sex will not interfere with a consideration of their merit.

Despite this honorable beginning to affirmative action, however, the program has now veered off its course and turned into a numbers game of dubious effect which is open to serious constitutional challenge. The Office of Federal Contract Compliance Programs' (OFCCP) rules and regulations require that each affirmative action plan must include a statistical "work force" and "utilization" analysis, and where the employer's utilization of minority groups are deficient, specific "goals and time tables," both on an annual and long-range basis, must be established to make up the deficiency. To make this analysis requires, among other things, a complicated, eight factor, availability analysis and any difference, no matter how minute or fractional, between availability and utilization in a job group must be accounted for. Moreover, the requirement for setting numerical goals is in no way preconditioned upon a finding of liability. Indeed, the goal is required irrespective of the cause of the disparity and without regard to the quality of the employer's EEO compliance program and to the inherent imprecision in availability statistics. Moreover, the agency has professed that they feel in no way bound by any restrictions on quotas and preferences established by Congress in Title VII.

If the employer fails to meet its goals and time tables, it faces the threat of enforcement proceedings and possible debarment. As a practical matter, few excuses satisfy most compliance officers and the pressure to hire and promote to meet the numerical objective becomes intense. Thus, contractors must of necessity inform their line decision makers that they will be held accountable for a failure to meet the goals. While the government sometimes tries to draw a distinction between goals and quotas, it is not surprising that line supervisors unsophisticated in the nuances and intricacies of the bureaucrat's jargon have difficulty making the distinction. Too often it is easier and safer to succumb to the government's demands for preferential treatment than to antagonize a compliance officer and cause an expensive and protracted enforcement proceeding.

E. United Steelworkers v. Weber -- The Employer's High Tightrope Without A Net

All of the pressures towards racial and sex preferences by employers came to a head in United Steelworkers v. Weber, 99 S.Ct. 2721 (1979). Reacting to pressure from the OFCCP and others, in 1974, Kaiser Aluminum entered into an agreement with its union -- the United Steelworkers -- which provided that one black was to be admitted for every white to a new in-plant training program for craft positions.

Although seniority controlled as between members of the same group, relative seniority and merit were disregarded where necessary to achieve the one-for-one quota. Thus, there were a number of senior white employees, including Brian Weber, who were rejected for admission in favor of junior blacks.

Weber filed a class action claiming that the affirmative action program discriminated against him and other similarly situated white employees in violation of Title VII. Both the district court and the Fifth Circuit Court of Appeals, emphasizing that there had been no showing of past discrimination by the company or the union, held that the admission quota violated the basic prohibition of Title VII outlawing discrimination against any individual on the basis of race.

In the Supreme Court, [illegible] employer and the union, with support from the government and civil rights groups, contended that the quota was valid. In effect, it was argued that the quota was permissible because Title VII was enacted as a spur for employers and unions to take race conscious action to overcome the effects of past discrimination, even if the discrimination was by society in general rather than a particular employer. All such programs would cease, they argued, if employers and unions were first required to admit they are guilty of discrimination before taking voluntary affirmative action. The company pointed to pressure by the OFCCP and findings of discrimination at other of its plants to support its position.

Weber's argument was simple and straightforward. There had been no finding of discrimination so "in this case, we have a pure, out and out, racial preference" and "it is clear beyond cavil that the obligation imposed by Title VII is to provide equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."

The Supreme Court held against Weber. Five of the seven justices participating in the decision held that the quota was not barred by the provisions of Title VII because Title VII's prohibition against racial discrimination "does not condemn all private, voluntary, race conscious affirmative action plans." Justice Brennan, joined by White, Marshall, Blackman and Stewart, cited the general legislative history of Title VII which they argued indicates that the general purpose of Congress was to improve the economic condition of blacks by promoting employment opportunities. Thus, they argued, it would be "ironic" if a law "triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long, constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

Justices Burger and Rehnquist, writing separate dissenting opinions, argued that Title VII is unequivocal in prohibiting all race conscious decisions. In particular, Justice Rehnquist detailed the numerous (and unanimous) views of every congressman who spoke on the issue during the Title VII debates which are directly contrary to the majority's holding.

No matter what one's views are on the legitimacy of the Weber holding as a matter of policy, in this commentator's opinion, the majority's opinion is unprecedented to the degree to which it does violence to traditional legal principles and conventional legal analysis. Despite the majority's protestations to the contrary, its decision endorsing racial quotas is directly contrary to the views expressed in the voluminous legislative history chronicled by the dissenters. Moreover, the decision is irreconcilable with numerous prior pronouncements by the Supreme Court itself. In short, the decision is "judicial legislation" and ought to be analyzed as such.

Analyzed as a piece of legislation, it is noteworthy that the decision is a victory for the establishment. A major employer, a major labor union, the organized civil rights movement and the Federal government were all unanimous in favoring the Kaiser quota. Thus, it is somewhat understandable that once the court put on its legislator's hat, Weber had little chance of prevailing.

In this sense, Justice Blackman's concurring opinion probably tells best what was going on. Justice Blackman acknowledged the legitimacy of the dissenter's view that Congress did not, in drafting Title VII, intend the result he and the rest of the majority now uphold, but he joined the majority so that employers are not left on a "high tightrope without a net beneath them" -- i.e., threatened by lawsuits by blacks if they don't take affirmative action, while threatened by lawsuits by whites if that affirmative action is deemed too aggressive.

Given the essentially legislative nature of the Weber holding, the future of affirmative action, I submit, will depend more on social, economic, cultural and political factors than upon finer interpretations of the words of the decision. It is arguable that for the enforcers to focus on the "bottom" line as the principal means of enforcement and for employers to use quotas and preferences as the principal means for avoiding liability may be the most simple and direct means of implementing the anti-discrimination statutes.

This approach had particular appeal in the early years of EEO enforcement when there were large disparities at entry level positions where little in the way of qualifications were needed for hire. Thus, it could be argued, there was little loss in productivity by substituting numbers for a merit system and the inherent unfairness in the numerical approach was less visible because the effects of the reverse discrimination tended to be diffused among unidentifiable potential applicants or actual applicants who had difficulty identifying themselves as victims of the reverse discrimination.

As we enter the 1980's, however, the enforcement effort is increasingly centering on higher rated jobs such as craftsmen, inspectors, supervisors, managers, technicians and professionals. Education, specialized skills, training, prior related job experience, prior successful performance and other factors have long been recognized as crucial to success on these higher-rated positions and as fair and reasonable factors upon which to base selection decisions. Thus, when a consideration of such merit factors is abandoned in favor of preferences, those passed over applicants who possess the qualifying factors to a greater degree than the persons selected become readily identifiable victims of discrimination and the inherent unfairness of a preferential selection system is made particularly manifest.

At the same time, it sends a signal to the preferred group that these qualification factors are of no real importance, thus undercutting their incentive to acquire additional knowledge, skills and abilities to their long-range detriment.

Equally important, as noted, the abandonment of merit selection programs to serve EEO objectives can have severe consequences on productivity, to the ultimate detriment of employees of both groups.

In short, in my opinion, it is unwise to make the statistical parity or bottom line approach the cornerstone of EEO enforcement policy. Fundamental reform in EEO enforcement is needed which removes the "high wire" which employers are forced to tread. The basic policies which should be implemented to ensure a balanced enforcement approach which does not compel race and sex preferences and which promotes merit selection systems are discussed in the next sections.

III. THE GOVERNMENT SHOULD DECLARE THAT QUOTAS AND PREFERENCES ARE CONTRARY TO PUBLIC POLICY

There is no question that the arguments of the advocates for the statistical parity theory and race and sex preferences have an initial intellectual appeal. Most thinking people, I believe, are committed to eliminating the vestiges of discrimination from our society and the sooner we can proclaim victory by pointing to statistics showing tangible evidence of full parity, the better. But the issue, of course, is whether this end is justified by any means, including a seeming violation of the very laws which initially triggered our resolve to make race and sex irrelevant in our decision making processes. Whenever I reflect beyond the initial appeal of arguments of the quota advocates, I must conclude from my experience that the "statistical parity" theory of enforcement and quota demands do not serve the interests of the groups which the laws are intended to protect and are not justified in light of severe burdens and costs imposed on employers or the injuries suffered by the victims of the treatment.[*]

Among the most fundamental reasons why quotas and preferences are of such questionable validity is that they do not even purport to accomplish the objective of the civil rights laws. Not only do they sacrifice race and sex neutrality, but they are not intended as redress for a legal injury. Persons benefit not because they have personally shown that they have suffered from bias or prejudice at the hands of their employer, but only because they happen to be a member of a race or sex which at the particular time is statistically "underutilized" and the subject of a goal or quota. Or put another way, even if a statistical disparity may have been the product of the employer's or societal discrimination, the victims of that discrimination are in no way compensated simply because some other member of their race is preferentially promoted. On the other hand, that preferential promotion does create another victim of race discrimination -- the person who would have otherwise received the promotion if merit, rather than race, had been determinative.

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[*] See, for example, H. Northrup, "The Impact of the AT&T EEO Consent Decree (1979)," a critical study by The Wharton School, Industrial Research Unit, of the re-results of the quota relief implemented by the 1973 AT&T consent decree with the government.

Preference proponents also argue that affirmative action in the form of quotas and preferences should be encouraged because it works. Encouragingly, minorities and females have been making significant strides but I know of no proof that this is the result of preferences. Rather, my experience suggests that this has resulted primarily because of the elimination of race and sex barriers and affirmative action to promote equal treatment -- progress consistent with the objective of anti-discrimination laws as well as merit selection principles.

In any event, even if one might decipher some overall statistical progress as the result of quotas, the adverse consequences flowing from quotas far outweigh any such marginal gain in numbers.

First, the emphasis on statistical parity and quotas is demeaning to the very groups that the law is intended to benefit by implying that the protected group members are not capable of competing on their own merit. This tends to institutionalize the very stereotype that the discrimination laws were intended to eliminate. Second, and most obviously, the morale of passed over employees is severely undercut when protected group members are granted preferences for hiring and advancement so that the employer can achieve parity. Not only does this destroy legitimate expectations and the incentive of the passed-over employees, but tends to increase racial tensions by giving a justification for bias. Third, the incentive and ability of managers and supervisors to manage is threatened when random or quota selection replaces their right to evaluate and select employees based upon merit. Fourth, the statistical parity theory invariably results in the abandonment of the "most qualified" standard for the "basically qualified" or "lowest common denominator" standard or, in some cases, no selection standard at all. As discussed elsewhere herein, when projected across our entire economy, this pressure to substitute numbers and the "lowest common denominator" standard for merit selection results in immense costs in lost efficiency, productivity and quality.

In addition to the foregoing, however, it is most curious to me that in this area of the law where we should be most sensitive to individual rights, affirmative action in the form of quotas results in elevating group rights to a status that is often totally insensitive to personal and individual considerations.

What the advocates of statistical parity and quota-based decisions forget is that each time there is a decision based on a race or sex preference rather than merit, a very human drama is played out involving the beneficiary of the preference, the victim of the reverse discrimination and the line manager who is responsible for the decision. But as a practical matter, the drama is often played out in secret because the decision maker simply cannot rationalize to either the beneficiary, the victim of reverse discrimination or himself why the law which he was initially taught compels him to disregard race now, he is told, requires him to prefer employees because of their race. If affirmative action is such a lofty and defensible concept, however, why shouldn't the actors in this drama be forthright and honest with each other as to the true basis for the decision?

My answer is that, while simple to advocate as a concept, the proponents might view their arguments much differently if they were personally affected. Would the proponents, upon receiving a preferential promotion themselves, be willing to acknowledge and proclaim that they received the promotion not because they were the best, but because they were black or female? Or wouldn't they simply feel embarrassed and totally deflated when they discovered that their merit and performance were not, after all, determinative? [*]

On the other hand, would the preference activists who sought a prized position truly be so tolerant if they were the victim who lost out to a quota beneficiary? Or wouldn't they also feel the same frustration and disillusionment which others such as Brian Weber and James Bakke felt?

I also challenge those who advocate preferences to place themselves in the decision maker's role and I ask them what they would be willing to tell the other two players in the drama. For example, would the preference advocates be willing to forthrightly tell blacks on a routine basis that, although they are less qualified than their co-employees, they are being selected because of their race in order to correct a statistical disparity? I submit that such candor would totally destroy the exhilaration and implicit acknowledgement of worth normally associated with advancement and even the strongest advocates of preferences would be unwilling to be so honest and place such a stigma on the selectee.

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[*] For example, at a recent conference at which affirmative action was discussed, the attendees were polled on the issue and, while most of the whites in attendance favored affirmative action, most of the blacks opposed it as unduly patronizing. Auletta, "The Underclass-III," The New Yorker, November 30, 1981 at pp. 166-67.

And what of the person of more merit who is passed over in favor of the quota beneficiary? Would the quota advocate be willing to face the exclamations of frustration and bitterness which such full candor would inevitably generate? Would that decision maker be prepared to take the risk that his candor would result in the true reasons for the selection being spread throughout the work force? While the lofty justifications for preferential treatment such as given by the academicians, lawyers and civil rights leaders in these hearings might have appeal for the very sophisticated, do these advocates really believe that they could make these rationale sufficiently understandable to satisfy the average lay employee?

In sum, no one is reluctant to proclaim a merit selection far and wide. The selectee is justifiably proud and wants his peers to know of his recognition and the employer heralds a merit selection so as to encourage maximum productivity and initiative by others. In contrast, in a quota-based environment, the employer has no satisfactory alternative. Either it must acknowledge what is occurring and face an atmosphere of frustration, bitterness, distrust and an inevitable fall off in productivity, or it must attempt to hide what is going on even though it is axiomatic that nothing is more destructive of sound personnel relations than a failure to communicate candidly with employees.

Finally, it has been hypothesized that affirmative action in the form of preferences undercuts those qualities which history has shown have proved most important for other disadvantaged ethnic groups in raising their economic level. As Thomas Sowell has concluded in Race and Economics (1975) at p. 238:

> Perhaps the greatest dilemma in attempts to raise ethnic minority income is that those methods which have historically proved successful--self-reliance, work skills, education, business experience--are all slow developing, while those methods which are more direct and immediate--job quotas, charity, subsidies, preferential treatment--tend to undermine self-reliance and pride of achievement in the long run. If the history of American ethnic groups shows anything, it is how large a role has been played by attitudes--and particularly attitudes of self-reliance.

In sum, I ask the preference proponents to think through how their advocacy, if accepted, would actually affect the individuals involved. From my experience, in addition to the moral, ethical and legal considerations which militate against quotas, the adverse practical consequences on the persons actually affected and on society generally [illegible] real and far outweigh the presumed advantages of race [illegible] sex preferences.

IV. GUIDELINES ON THE PROPER ROLE OF STATISTICS SHOULD BE ISSUED BY THE ENFORCEMENT AGENCIES

It is the thesis of my testimony that before anything can be done about the problems of quotas and preferences and the disruption of merit selection systems, basic reform in the enforcement of the anti-discrimination laws is needed. As noted, although Congress and the Supreme Court have warned the lower courts and the agencies of the potential danger of an undue reliance on statistics, the enforcement agencies have paid little attention to these warnings and continue to make findings contrary to traditional legal notions on the reliability of statistics and which overlook direct evidence contrary to the statistical inferences relied upon.

A balanced approach to enforcement could cure the problem without the need for extensive statutory amendments. The administrative agencies such as the EEOC and the President in enforcing the Executive Order should take the lead and act much more responsibly by amending existing rules and issuing guidelines which present a more realistic and fair approach to EEO enforcement.

Among the guidelines which should be promulgated to guide the enforcement agencies in the use of statistics are the following:

(1) Statistics are at best only circumstantial evidence of discrimination and should only be given weight when the disparities are significant (according to sound statistical theory) and only when the statistical evidence is corroborated by actual evidence of discrimination against identified victims of discrimination.

(2) Statistics based simply on an analysis of an employer's current work force percentages (a "snapshot" or "profile" of the work force) are inherently unreliable because an employer's work force is formed over many years. Most of the transactions which make up such raw work force profiles occurred long before the charge at issue was filed and often before the laws against discrimination were even passed. Thus, the only relevant analysis is an examination of the "flow" of protected group members into the position at issue during the relevant time period covered by the charge of discrimination at issue.

(3) In determining whether there is statistical disparity in the flow of minorities into the positions at issue, the statistical comparison should be based on a realistic assessment of the number of qualified protected group members in the applicable pool. Thus, if there is evidence that the position at issue requires specific qualifications which are not possessed by the populace generally, the burden should be placed on the government or the plaintiff to show the percentage of protected group members with the requisite qualifications in the work force generally before any statistical presumption can be made.

(4) In determining the availability pool, the statistical analysis should be made only in the geographic area from which the employer actually draws its employees. Thus, for example, the practice of the government in relying upon artificial statistical areas used by the census bureau, such as the Standard Metropolitan Statistical Area, should be eliminated when the evidence shows that the employer actually draws from a smaller or a larger area.

(5) It should also be recognized that simply because there is a statistical disparity, it does not necessarily follow that there are victims of discrimination entitled to back pay and other relief. Such relief should only be demanded and awarded when actual victims of discrimination are specifically identified and proven. The propensity of the enforcement agencies to take a broad brush approach and insist on back pay for large groups of employees without proof that individual members of the group were discriminated against (or, indeed, were even interested in or qualified for the positions at issue) provides only an unjustified windfall for the recipient and does nothing to serve the objectives of the law. On the other hand, such undeserved windfalls raise severe resentment among the nonrecipients and such demands severely inhibit the prospect of amicable settlement and are the principal cause of long and wasteful litigation.

V. THE JOB RELATEDNESS STANDARD MUST BE INTERPRETED IN A MANNER WHICH ENSURES THAT EMPLOYERS MAY SAFELY RELY UPON FAIR AND REASONABLE SELECTION SYSTEMS

Some of the more zealous enforcers of the antidiscrimination laws have argued that employee selection methods have little impact on the performance and productivity of a work force so merit selection procedures may be safely manipulated to achieve objectives such as a racially balanced work force. But most experts would contend that fundamental to an employer's efficiency and ecomonic survival is its ability to match employee skills to jobs properly and to establish a compensation system that encourages employee incentive. Obviously more skilled and able employees will make a greater contribution to productivity and, therefore, those employees should be preferred and command higher wages.

Economic theory as well as common sense and experience has long recognized that such indicia as education, specialized skills, prior related experience, prior successful job performance, cognitive skills and training are generally relevant in determining the overall worth and potential of an employee. The enforcement agencies and some lower courts, however, have interpreted the Griggs v. Duke Power Co. holding as requiring an employer to provide specific validation data on the job-relatedness of each qualification factor which it deems relevant to selection for each job whenever a disparate impact is shown. As a practical matter, such a strict construction compels a virtual elimination of skill qualification factors as a legally valid defense in an enforcement proceeding because the requisite validation studies would not be technically feasible or would be prohibitively expensive.

For example, while it may be feasible to validate typing ability for a secretary or mathematical skill for a computer analyst, to quantify objectively the performance level of higher level employees who perform a multitude of not easily measured tasks, such as supervisors, teachers, attorneys, inspectors, etc., is a most difficult, if not impossible, task. Thus, because one cannot quantify performance, there is no direct way of validating skill indicators. Gwartney, Asher, Haworth and Haworth, Statistics, The Law and Title VII: An Economist's View, 54 Notre Dame L. Rev. 633, 641-42 (April 1979). As these commentators conclude:

> A narrow legal interpretation of the job-relatedness critera becomes a Catch 22. Racial differences in mean earnings, hiring rates, and promotion rates cannot be justified via differences in qualifications among whites and blacks, unless each qualification factors (e.g., educational experience, absenteeism) is proven to be job-related. But if it is impossible to quantify employee performance objectively, there is no way that a qualification factor can be validated. The end result of this vicious circle is the elimination of valid skill qualification factors from the employment assignment process.

Id. at 642.

Moreover, another group of experts in assessing the Uniform Selection Guidelines On Employee Selection which contain the government's views on what is necessary to achieve technical validation has warned:

> From a technical point of view, it is imperative that those who interpret these Guidelines understand that, principally for reasons of technical infeasibility, the majority of the country's employers will not be able to conduct the validity research contemplated by the Guidelines. The majority of these employers are smaller employers, with employee numbers of insufficient size for criterion-related validity research efforts and without the technical expertise to conduct content validity research and development when it is appropriate. Further, many companies do not possess the necessary professional competence internally and the professional competence available externally is sometimes too limited to meet the need. Even very large employers will find it difficult, often impossible, to accumulate the very large numbers of persons hired in to the same job which are required for validation studies."

Ad Hoc Group On Uniform Selection Guidelines, A Professional and Legal Analysis of Employee Selection Procedures, (ASPA 1981), p. 125

The government has shown little sympathy for these problems. This has led to a virtual elimination of qualification factors by many employers.

It is apparent that neither Congress nor the Supreme Court intended such a strict construction of the job relatedness requirement. Indeed, in Section 706(b) of Title VII, Congress expressly provided:

> Nothwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment

> pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate. (Emphasis added.)

42 U.S.C. § 2000e-2(b) (1970)

Similarly, as noted in Griggs, the Supreme Court only sought to outlaw "artificial, arbitrary and unnecessary barriers to employment" which cannot be shown to be related to job performance. Otherwise, the Court went out of its way to emphasize that Congress did not command that "the less qualified be preferred over the better qualified simply because of minority origins." On the contrary, Congress made such "qualifications the controlling factor." Supra at 10-12.

Thus, as concluded by Gwartney, et al.:

> Clearly, the framers of Title VII did not believe that they were eliminating racial differences in compensation, promotion rates, and occupational representation when these disparities reflected the racial (or sexual) differences in the qualifications, skills, and merit of the individual workers employed by a firm.
>
> ... When the qualifications (skills) of blacks are similar to those of whites, equal treatment is expected. On the other hand, when the qualifications (skills) of black employees are, on average, lower than those of whites, Congress recognized that continued racial disparities would be present. Equal treatment of equals is all that is mandated by Title VII.

Gwartney, et al., id. at p. 640.

Accordingly, the job-relatedness standard must be applied in a manner which takes account of the realities of employment selection. Simply because it is not feasible or practical to validate a qualification factor does not make it an unimportant factor. If a position requires specialized knowledge, skill, and ability, the employer should be allowed to choose the best qualified based upon an analysis of such factors as related specialized education, related training or prior related job experience. In any position where basic mental skills are important, to prefer applicants with the most education should be presumptively valid. Any other selection standard which seems obviously job related based on common sense and common experience should also be presumptively valid.*/ Such commonly used and accepted standards should only be invalidated if the government establishes that they are arbitrary, artificial or adopted as a pretext for discrimination.

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*/ Among those qualification standards which courts have accepted without formal validation are *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (transit authority's refusal to hire methadone users obviously job related); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) (construction company's refusal to hire strangers obviously job related); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (high school diploma obviously related to policeman's job); *Townsend v. Nassau County Medical Center*, 558 F.2d 1117, 1120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015

(Footnote continued)

Moreover, the enforcement agencies must recognize that decisions about hiring into managerial, supervisory and other high level positions cannot realistically be made using objective factors alone. The tendency to condemn subjective standards *per se* assumes that whites will

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(Footnote continued)

*/ (1978) (college degree requirement for medical technologist obviously job related); *Smith v. Olin Chemical Corp.*, 555 F.2d 1283, 1286 (5th Cir. 1977) (validation not required where "requirement is patently neither artificial nor arbitrary, and is obviously related to business necessity"); *Chrisner v. Complete Auto Transit*, 645 F.2d 1251 (6th Cir. 1981) (experience requirement for truck drivers obviously job related); *Garcia v. Rush Presbyterian-St. Luke's Medical Center*, No. 80-2087 (7th Cir. Sept. 30, 1981) (English language obviously job related for hospitals); *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (college degree requirement for airline pilot obviously job related); *Klapac v. McCormick*, 640 F.2d 1361 (D.C. Cir. 1981) (requirement of prior supervisory experience clearly job related); *Hawkins v. Anheuser-Busch, Inc.*, 504 F. Supp. 882 (E.D. Mo. 1980) (college degree obviously job related for supervisor of trade returns); *Campbell v. Ramsay*, 484 F. Supp. 190, 195 (E.D. Ark. 1980) (Ph.D. requirement for college professor obviously job related); *EEOC v. American National Bank*, 21 EPD ¶ 30,369 (E.D. Va. 1979) (good credit requirement for bank teller obviously job related); *Edmonds v. Southern Pacific Transp. Co.*, 19 FEP Cases 1052, 1078 (1979) (common carriers' requirement for high school diploma obviously job related); *EEOC v. North Hills Pasavant Hospital*, 466 F. Supp. 783 (W.D. Pa. 1979) (residence requirement for hospital obviously job related); *Anderson v. U.S. Steel Corp.*, 19 FEP Cases 1215 (N.D. Cal. 1979) (prior experience requirement obviously job related); *Smith v. Moore*, 22 FEP Cases 714, 716 (1977) (absentee record obviously job related).

always exercse bias. This assumption is not supported by any scientific studies and suffers from the same type of racial stereotyping that the laws are intended to eliminate. Instead, before such an assumption is made, there should be positive evidence of intentional and purposeful discrimination before any finding of discrimination is permissible. In this regard, the agencies should in good faith give credit to employers who take affirmative action steps and adopt checks and balances to ensure against bias in the selection system.*/

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*/ Among the court cases which have rejected the claim that subjective standards are per se illegal are Nath v. General Electric Co., 16 EPD ¶ 8,109 (E.D. Pa. 1977), aff'd mem., 594 F.2d 855 (3d Cir. 1979) (evaluation of engineers "is necessarily based on factors that are not purely objective"); Scott v. University of Delaware, 601 F.2d 78, 81 (3d Cir. 1979) (tenure decision of university); Smith v. University of North Carolina, 632 F.2d 316, 345 (4th Cir. 1980) (tenure decisions of university); Nance v. Union Carbide Corp., 540 F.2d 718, 727 (4th Cir. 1976) inability to work with others legitimate reason to deny promotion to supervisory job); Wilkins v. Univeristy of Houston, 654 F.,2d 388, 400-401 (5th Cir. 1981) (tenure decisions of university); Bay v. Goodyear Tire & Rubber Co., 23 EPD ¶ 30,903 (S.D. Tex. 1980); aff'd mem., 638 F.2d 1233 (5th Cir. 1981) ("[e]mployment decisions often cannot realistically be made on the basis of objective standards alone"; Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1128, 1124 (5th Cir. 1977) (promotion to management position properly based on subjective factors); Burns v. Thiokol Chemical Corp., 6 FEP Cases 261, 268 (M.D. Ala. 1971), rev'd on other grounds, 483 F.2d 300 (5th Cir. 1973) (promotion to foreman properly based on subjective factors); Meyer v.

(Footnote continued)

VI. THE UNIFORM SELECTION GUIDELINES MUST BE REVISED TO TAKE ACCOUNT OF CURRENT EXPERT OPINION

One of the great ironies of EEO enforcement is that most experts contend that in choosing a selection system there are no alternatives better than tests for accomplishing the dual objective of increasing productivity while minimizing adverse impact. Tenopyr, "The Realities of Employment Testing," Vol. 36, No. 10, *American Psychologist* (October, 1981), pp. 1123-25. Nonetheless, employment testing has been that selection alternative which has been subjected to the most vigorous attack by the EEO enforcement community. Indeed, as noted, because of the rigid legal requirements which are now embodied in the Uniform Selection Guidelines, most employers have simply abandoned testing. The shortsightedness of the enforcers' unrelenting attack on tests is only now being fully realized.

Footnote continued

Missouri State Highway Commission, 567 F.2d 804, 809 (8th Cir. 1977), *cert. denied*, 335 U.S. 1013 (1978) (promotion to shift captain properly based on subjective factors); *Bauer v. Bailer*, 647 F.2d 1037 (10th Cir. 1981) (supervisory positions "require abilities not fully measurable by objective standards"); *Williams v. Colorado School District*, 641 F.2d 835 (10th Cir. 1981) (promotion to supervisory position properly based on subjective standards); *Knight v. Father Flanagan's Boys' Home*, 479 F. Supp. 505, 511 (D. Neb. 1979) (selection of "family teacher" properly based on subjective factors); *EEOC v. North Hills Pasavant Hospital*, 466 F. Supp. 783 (W.D. Pa. 1979) (selection of nurse properly based on subjective grounds).

It is now generally accepted that selecting high performers is more important for employer productivity than previously thought. Indeed, Professors Frank L. Schmidt and John E. Hunter contend that, based on conservative estimates, the gross national product could be increased by up to $100 billion per year if improved selection procedures were introduced throughout the economy. Schmidt and Hunter, "Employment ment Testing, Old Theories and New Research Findings," Vol. 36, No. 10, American Psychologist (October 1981), p. 1129. It is also generally recognized that many of the theories upon which the Guidelines were premised have been substantially disproven by more recent research studies. Accordingly, it is submitted that the Selection Guidelines should be substantially amended to take account of more current expert opinion so that employers can safely make much greater use of tests.

One of the principal motivations for the government's early distrust of tests was the unproven, but widely accepted claim in the 1960's, that tests are "unfair" to blacks. Thus, for example, it was hypothesized that even though blacks may score lower on a test this wil not mean they will be lower performers on the job (the test unfairness theory) and that because of cultural differences, tests that are valid for the majority may be invalid for minorities (the differential validity theory). Thus, the differential validity theory was incorporated into the original testing guidelines (including the possibility that separate validity studies for each group would have to be conducted) and the current Guidelines provide that the "test user generally should investigate the possible existence of unfairness." Because of the absence of any scientific precision to these concepts, employers found them almost impossible to work with, thus further accelerating the decline in the use of tests.

More recent research has now established, however, that these theories have no significant scientific support. Tests are equally valid for all groups and lower test scores among minorities are accompanied by lower job performance, exactly as in the case of the majority. Ad Hoc Group, A Profesional and Legal Analysis of the Uniform Guidelines (ASPA 1981), pp. 151-155; Schmidt and Hunter, "Employment Testing, Old Theories And New Research Findings," Vol. 36, No. 10, American Psychologist (October 1981), pp. 1130-31.[*/]

In short, the cumulative research establishes that tests do not cause discrimination. "The average ability and

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[*/] In fact, to the extent any differences have been found, they more often overpredict the performance of minorities and, thus, are arguably unfair to whites. Ad Hoc Grup at 153.

cognitive skill differences between groups are directly reflected in job performance and thus are real."[*/] Schmidt and Hunter at 1131. By continuing with the fiction of test "unfairness," the Guidelines' not only inhibit the use of valid tests but focus on the wrong problem. Instead of arguing about the effect of tests, the governmental resources should be expended on attempting to solve the educational and social problems which have caused some disadvantaged groups to be handicapped in acquiring the skills measured by tests to the same degree as other groups.

Given the substantial costs which can be incurred in attempting to validate tests, another significant recent development is evidence that test validities generalize to a far greater extent than had been believed previously. The Selection Guidelines are premised on a requirement that tests must be validated for each job at each facility. Recent studies have shown, however, that (1) tests which are valid for selection for jobs at one organization or setting are valid for the same jobs at another organization or setting' and (2) that tests need not be validated for each job but may

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[*/] While the causes for these differences are varied, such differences tend to disappear over time. For example, Polish American IQ's averaged 85 in 1920 -- the same as blacks today -- but had risen to 109 by the 1970's. Sowell, Ethnic America (Basic Books, Inc. 1981), p. 9.

be validated for large job families. Indeed, Schmidt and Hunter contend that mental ability tests have at least some degree of validity for virtually all jobs. Id. at 1133.

If these studies are accepted, it will become much more economic for employers to obtain the productivity increases which flow from validated tests. Small employers will be able to rely upon validity studies by large employers and consortium studies and large employers will be able to make much greater use of validated tests throughout all of their facilities. Thus, the government should encourage research into generalization of tests, instead of continuing to assert the now suspect theories of the Guidelines which make most testing impractical.

Related to the foregoing is the assumption implicit in the Guidelines that the utility of even the most valid tests is so sufficiently low that cut-off scores can be manipulated to minimize disparate effect without substantially affecting productivity considerations. This has been manifested in government pressure to abandon the "best qualified" standard in favor of setting minimum qualification requirements, often at the level of the least qualified incumbent worker. The employer then must choose among those who meet the minimum competency level using other factors, including quotas.*/ Schmidt and Hunter have found, however, that "minimum competency" selection systems result in productivity losses 80% to 90% as great as when there are no valid selection procedures. Schmidt, supra at p. 1130. As they explain, employee productivity is on a continuum, as is the relationship between ability test scores and employee job performance. Id. Thus, it is good professional practice and best serves productivity objectives to select from those who score highest on the test.**/

While the foregoing represent some of the more serious deficiencies in the Uniform Guidelines, there are many others amendments which should be made in the guidelines to bring them in line with current expert opinion. Most of these are detailed in the Ad Hoc Group, A Professional and Legal Analysis of the Uniform Guidelines (ASPA 1981). In considering these amendments, however, the inherent distrust of tests must be abandoned by the policymakers.

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*/ One group pf commentators has referred to this as the "warm body" hypothesis -- all persons who have a warm body are equally qualified and different degrees of competency are irrelevant. Gwartney, et al., Statistics, The Law And Title VII: An Economist's View, 54 Notre Dame L. Rev. 633, 643 (April 1979).

**/ While the so-called minimum competency system was intended to reduce adverse impact on minorities, Schmidt and Hunter argue that the preferable means for accomplishing this objective would be to select from the top down in each group pursuant to an appropriate ratio. Although perhaps objectionable on other grounds, this guarantee elimination of the disparity and typically yields 85% to 95% of the productivity gains attainable under an optimal nonpreferential use of tests. Id.

As one commentator stated in observing that it is unfortunate that the guidelines on tests have developed more in line with sociopolitical aims than with scientific knowledge:

> The inflation and other adverse factors associated with generally low productivity probably effect disadvantaged groups more than other groups. Certainly, the appropriate social policies are those that will afford equal employment opportunity and at the same time provide for increased productivity. Selection testing has an important role in these policies. In the long run, the constructive use of employment tests can benefit everyone. Tenopyr, "The Realities of Employment Testing," Vol. 36, No. 10 American Psychologist (Oct. 1981) pp. 1125-26.

VII. SUBSTANTIAL REFORM OF THE EXECUTIVE ORDER PROGRAM IS NECESSARY TO BRING IT WITHIN THE CONGRESSIONAL AUTHORITY AND INTENT

Extensive procedural reform is also long overdue under the Executive Order. Thus, in order to give this Committee the benefit of detailed proposals on these issues, I am submitting herewith four papers previously submitted to the OFCCP in response to its invitation for comments on a variety of issues.*/

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*/ These papers are entitled: Basic Legal Principles Governing The Executive Order Program, The Use Of Statistical Data

(Footnote continued)

As detailed in these papers, there are a number of fundamental issues as to the basic constitutionality of the Order and the legality of a number of the positions taken by the OFCCP in administering the Order. Congress should be particularly concerned about these issues because they represent an effort by the OFCCP to operate far beyond the bounds set by Congress and, in some respects, in direct contravention of Congressional mandates. Among the issues addressed are:

(1) The questionable Constitutional Authority for issuance of the Order in the first instance.

(2) Even if the Order is valid, the lack of authority for extending the Order beyond facilities and employers directly engaged in government business.

(3) The lack of authority for race and sex conscious goals in the procurement statutes which are relied upon as the statutory authority for the Order.

(4) The absence of authority in the Order itself for race or sex conscious goals.

(5) The inherent conflict between Title VII and the Executive Order as a result of the OFCCP contention that the Title VII prohibition on goals and quotas is not binding on the OFCCP.

Footnote continued

In Affirmative Action Planning Should Conform To The Principles Of Title VII, Back Pay Is Not Available Under Executive Order No. 11,246, and The Use Of Job Groups In Affirmative Action Planning.

(6) The OFCCP's refusal to be bound by the Title VII protection for bona fide seniority systems.

(7) The absence of authority for seeking back pay against employers.

(8) The redundancy and unnecessary duplication between Title VII and the Executive Order.

When the foregoing fundamental deficiencies in the Order are recognized, it becomes inconceivable that Congress ever intended for government contractors to become enslaved by the expensive, hypertechnical requirements of the current OFCCP framework with its near maniacal emphasis on numbers and percentages and statistics. In the past 10 or 12 years this fascination with form over substance has become so pervasive in the agency that it has eclipsed the true purpose of the program: to ensure nondiscrimination. A recent study by the Equal Employment Advisory Council found that the cost to a major corporation for a single compliance review usually exceeds $20,000. The report also indicated that contract compliance activities cost the Fortune 500 companies approximately $942 million per year -- nearly a billion dollars. And yet, OFCCP's Fiscal Year 1982 budget justification report stated that in the previous fiscal year it found actual discrimination in only 4 percent of the 2,632 compliance reviews conducted. We can safely assume, based on our clients' numerous experiences, that the other 96 percent of the reviews was devoted to nitpicking -- to arguing over availability rates, job groupings, the language of affirmative action programs and other such trivia.

The simple fact is that most federal contractors know that it's unlawful to discriminate in their employment practices and further that it's bad business and bad personnel practice. They don't need a sledge hammer pounding on their heads to remind them of this. But, unfortunately, the bludgeon approach has been in vogue at the OFCCP. And because most contractors cannot afford to spend large sums on legal fees, they typically acquiesce in compliance officers' demands for artificially high availability rates and goals, for questionable back pay settlements, and for impractical job groupings. The bureaucrats have taken a program with an originally laudable aim and turned it into a numbers game of dubious effect that is open to serious constitutional challenge.

Moreover, as noted, there are serious questions as to whether the contract compliance program can reach contractors' facilities that are not directly engaged in performing under a government contract and whether goals and time tables can be required absent some showing of discrimination. These issues now must be given serious consideration by, first, the Executive Branch, and if it does act with meaningful reform, by Congress.

In addition, the means by which the agency seeks to justify its persistent efforts to obtain back pay -- a measure that is not even mentioned in the Executive Order and was not addressed in regulations until 1978 -- are also a significant broadening of Title VII principles. In fact, it is quite doubtful that the agency has any authority for seeking back pay. The Executive Order program should be prospective in operation, concerning itself not with punitive or remedial measures (which are the province of the EEOC under Title VII) but with efforts to promote nondiscrimination in employment.

Moreover, to the extent statistical data are used in affirmative action planning they should conform to the principles of Title VII such as are summarized in Section IV hereof and discussed in detail in the materials submitted herewith.

Finally, the most disturbing aspect of Weber and the many pronouncements by proponents of preferential treatment is that they equate "affirmative action" exclusively with preferences. I submit, however, that affirmative action should be redefined to exclude preferences and to include only affirmative action to promote equal treatment. Most sophisticated employers fully recognize that they must move affirmatively to ensure compliance with the nondiscrimination laws. But increasingly these valuable personnel programs are being neglected, in favor of a narrow focus on the numbers.

Among the programs which should be encouraged are the following:

(1) the continued communication to all members of the organization of the employer's commitment to equal employment opportunity;

(2) the sensitizing and training of managers in fair selection and evaluation techniques;

(3) specialized training of personnel specialists in preventing discrimination and promoting minority and female advancement;

(4) periodic review of policies and procedures to eliminate those which have a discriminatory effect or which are in need of restructuring to minimize the risk of bias going unchecked;

(5) affirmative recruitment of outside applicants to increase the pool of qualified minorities and females for consideration for hire (this does not mean different standards must be applied once the pool is created);

(6) developing a skills and experience inventory of existing promotable minority employees so as to ensure that all qualified minorities are given advancement consideration;

(7) active encouragement of qualified minorities to seek out advancement opportunities to increase the pool of qualified applicants; and

(8) advising and counseling of minorities on the means for developing additional skills and education to enhance their advancement potential.

While it is fashionable by some to denigrate the importance and effectiveness of the foregoing, it is submitted that these provisions still provide the backbone of a fair and effective affirmative action program.

VIII. CONCLUSION

Perhaps it is a symptom of the "accordianlike effect" of the Supreme Court pronouncements in this area or perhaps the Court intends to send a final definitive signal, but, whatever, the Supreme Court's latest pronouncement on the subject matter of this hearing may best summarize my position. In Texas Department of Human Affairs v. Burdine, 101 S.Ct. 1089, 1096 (1981), the Court stated:

> The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions." McDonnel Douglas, supra, at 801, 93 S.Ct., at 1823. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. § 2000e-2(j). See Steelworkers v. Weber, 443 U.S. 193, 205-206 99 S.Ct. 2721, 2728-2729, 61 L.Ed.2d 480 (1979). The statute was not intended to "diminish traditional management prerogatives." Id. at 207, 99 S.Ct., at 2729. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. Furnco Construction Co. v. Waters, 438 U.S., at 577-578, 98 S.Ct. at 2949-2950.
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> * * *
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> [T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.

Thank you for listening to my views.

(Editor's note: In the interest of economy, appendices to Mr. Warner's statement were retained in the files of the committee where the material may be researched upon request.)

The **CHAIRMAN**. Just to be sure, what did you say is costing up to $100 billion unnecessarily a year?

Mr. **WARNER**. There have been some recent studies. The difficulty with this productivity loss is that it is very difficult to measure and it has come in not readily perceptible increments. But there have been experts in the industrial psychology field who have made very recent studies which compare the difference between having random selection and having valid tests and other selection procedures. They have projected this across their economy and made estimates—what they call conservative estimates—that it is costing our economy as much as $100 billion a year to not have valid selection systems.

The reason we do not have them is that the Government has made it impossible for employers to rely on many of the well accepted selection systems that most experts would recommend.

The **CHAIRMAN**. I think we are going to get into—if we are talking about the same thing—the uniform selection guidelines when we get to the EEOC. I think we have got to look at that.

Personally, what worries me about this subject is that everybody is sort of frightened of it. I do not blame anybody for being frightened of a subject like affirmative action, because I think the thing that worries most people is that there has been little public debate on this matter until recently.

I think our hearings have focalized some public debate. I think public debate is healthy. If affirmative actions, at least as they are presently interpreting Executive Order 11246, are valid, they ought to be able to withstand public scrutiny. You and I both know it is very difficult for them to withstand public scrutiny as they are presently enforcing the laws, especially the OFCCP.

While I support the basic intent of what past Presidents had in mind in issuing Executive Order 11246 on affirmative action—that is, trying to increase employment opportunities for minorities and women—I am against the way Federal regulators have gone about it. I think I have spoken out fairly substantially on that. They have gone beyond what the President intended and certainly what Congress spelled out under title 7 of the Civil Rights Act.

I think it is unfortunate that this administration is accused of backing away from civil rights simply because we are examining the civil rights agency. Other Federal agencies are frequently examined, but civil rights agencies have not been scrutinized at all. I might add that they have not been scrutinized by Congress for fear of being labeled racist or sexist. Frankly, that is not proper.

The purpose of Congress is to scrutinize these agencies, make sure that they are fulfilling the intent of the law in a good way, and make sure the law works. That is why I think these oversight hearings are effective.

We have already had some pretty good suggestions, including yours today, concerning some solutions to some of the problems and how we might get this system to work better for the benefit of women and minorities. If this is good public policy, what they are doing should withstand good public scrutiny.

I do not think very many people have come in here and said that the OFCCP withstands public scrutiny very well, not even some of those who basically want it to continue the way it is.

Let me just ask this question of you, Mr. Warner. And, Mr. Graham, you may want to comment on this, too. One of the big arguments that is constantly brought to us is this: If you do not have sanctions against business, if you do not coerce business or force business to meet a system of goals, timetables, and some people have even said quotas although most sophisticated civil rights advocates today will admit that they are against quotas—if you do not have these enforcement mechanisms, are we going to really reach this state where women and minorities are treated equally and fairly in our society? And let us add one other aspect that comes up all the time—especially since blacks in particular as a minority group have come into this country on a lesser footing than any other group of people; they came in as slaves.

How are we going to right these wrongs unless we have enforcement, like the OFCCP, and I guess the EEOC, we could say also, are really bringing about?

Mr. WARNER. I do not think anyone who has appeared before you on either side of this question is suggesting that we should not have vigorous enforcement of the antidiscrimination laws as they were written, as employers abuse the rights of minorities and women.

The CHAIRMAN. There seems to be a lack of confidence in the enforcement of title 7, which was promulgated, written, and passed as a set of color blind laws to make everybody equal in civil rights in this country and the enforcement of Executive Order 11246.

Mr. WARNER. To me, one of the difficulties of the effectiveness of the enforcement of title 7 is the EEO enforcement generally has been spread across too many different agencies. It is set up in a way that, if effectively enforced, it should be able to root out discrimination.

However, when you have two different agencies, in effect, trying to root out discrimination, spreading the governmental resources unnecessarily and undermining credibility, because it frustrates employers when they get dual investigation, that is one difficulty.

Employers set their own objectives, insuring that they rid their systems of discrimination. That is what the Executive order was originally about, but it was affirmative steps, as I described, to promote equal treatment. I think any employer is prepared to continue with that type of program. In my written testimony I have listed any number of items that that would involve. The difficulty is to go this next step of putting in numerical objectives, which are invariably converted to quotas as a practical matter. It is counterproductive, and it does not achieve the objective.

You can achieve the objective by applying the laws as originally enacted, if you have some efficiency and economy in the way they are enforced instead of spreading the effort through so many agencies.

Mr. GRAHAM. Senator, I would like to make one additional comment. The issue between OFCCP and EEOC, I think, can be sharply defined. Each agency appears to be trying to do the same thing.

The EEOC has been set up to enforce antidiscrimination laws either by hearings or investigations initiated by that agency, as well as provide an opportunity for individuals to come in and claim that they were discriminated against. The fact is that a considerable amount of that is going on.

The problem with the OFCCP is that they are trying to do the same thing. What has really fallen between the cracks over the past several years is that the affirmative action aspects of OFCCP, which was its original purpose—to encourage employers who wanted to do business with the Government to do something more. Do something more in what respect? To discriminate less? That is illogical, because you have EEOC that says you cannot discriminate. So what is it? It is to do something more to improve the supply of minorities and women in the workforce, so that they can be better able to take advantage of employment opportunities. That is the orientation that has been missing in the past few years.

On the question of, will employers voluntarily implement affirmative action programs? I am saying yes. In fact they are now.

This is just a minor illustration, Senator. Here is a brochure that is inserted in Exxon's annual report [indicating brochure]. It goes to every shareholder in the United States. On the inside cover is a breakdown—no law requires this. This is basically compelled, if you will, by the expectations of the American public and expectations of shareholders. This would go on whether or not there was any OFCCP or EEOC.

This demonstrates in some detail just where Exxon is and the number of employees employed in various job categories starting with the board of directors on down, over a 3-year time period. You can look at this and see immediately, in 5 seconds, if there is any progress here—how much progress has been made and in what respect.

Of equal importance—and this is what affirmative action is all about—is that also in a very summary form it talks about how a company like Exxon—and I am not just propagating Exxon; it is just the one I am most familiar with; it is true of many, many other companies—how a company goes about finding out where qualified minorities and women are, so that they can provide them the opportunity to come into their employment and thereby move these numbers up each year.

The second piece of it is completely new activity. Again under the definition of affirmative action, what can be done to increase supply? Sponsoring programs in schools, sponsoring programs in the community, working with the various minority agencies and colleges. That is what we mean by affirmative action. That is the kind of thing OFCCP ought to be looking for from employers who want to do business with the Government. That is what they should be looking for those employers to demonstrate, not chasing discrimination charges which are already being covered by another agency.

Mr. DAY. May I add one comment, Mr. Chairman?

The CHAIRMAN. You certainly may, Mr. Day.

Mr. DAY. I think another way of raising your very penetrating statement is to ask whether or not good-faith efforts can be subject to measurements, good-faith efforts of the kind Mr. Graham has just described. We believe they can. We believe the present 8-factor analysis, which is universally condemned, is the wrong way to go, but we think affirmative action data relevant to the individual company in the industry can provide a basis for a reasonable judgment related to the good-faith test.

We suggest, for example, the availability of persons having the requisite skills in the relevant labor market, the training that the contractor has undertaken in affirmative action efforts in the past and that it can reasonably do, the availability of transferable or promotable skilled individuals within the contractor's work force, the availability of people about to enter the labor market from training schools and colleges, and of course the requirements of a business.

We think that in the affirmative action context, filling this gap that now exists but falls between the cracks, and in these efforts to build the supply of qualified people to increase the skills and to make sure that those skills are relevant to the job that, good faith is more than just a phrase.

The CHAIRMAN. Thank you.

We have a number of other questions. I am going to submit them to you in writing, and I know that you will all do everything you can to answer them as quickly as possible. Thank you very much. We appreciate your effort in being with us today.

On our second panel we have Dr. John Bunzel, senior research fellow with the Hoover Institution, Stanford, Calif. Dr. Bunzel is a former president of San Jose State University, an outstanding educator, a recipient of numerous awards, and an author of numerous publications on public policy including affirmative action.

Dr. Paul Osterman is the assistant professor of economics at Boston University in Boston, Mass. Dr. Osterman's field is in labor economics, manpower policy, urban economics, and political economy, to name a few. He, too, has published widely.

We are grateful to have both of you gentlemen with us today. Dr. Bunzel, we will start with you, and then we will go to Dr. Osterman.

STATEMENT OF JOHN H. BUNZEL, SENIOR RESEARCH FELLOW, HOOVER INSTITUTION, STANFORD, CALIF.

Mr. BUNZEL. Thank you, Mr. Chairman.

I would like to take the time to thank you for inviting me to come 3,000 miles and to congratulate you on these hearings, but I am terrified this yellow light will go on, and so I will not do that. I would also very much like to comment on the variety of topics which have arisen from the first panel, but I will refrain from doing that too.

The CHAIRMAN. We would be happy to have you submit those comments for the record.

Mr. BUNZEL. As you know, Senator, some of the things we have talked about personally and in correspondence, and some of my articles, do address some of these questions.

The CHAIRMAN. They do. So anything you would care to submit for the record in that regard we would be happy to receive.

Mr. BUNZEL. Thank you.

I want to say first, as a long-time supporter of the civil rights movement and all of the efforts in this country in behalf of equal opportunity, that anyone who is disturbed by some of the excesses of affirmative action should no longer or even at all be considered an enemy of civil rights. I think you have stated that quite eloquently.

I also happen to think that it is time for those of us who are genuinely interested in the plight of the poor, the disadvantaged, and the alienated in this country to break away from many of the old and rather confining shibboleths and habits of thought when we consider how equality of opportunity can be enhanced and sustained for millions more of our citizens.

My criticisms of affirmative action follow along the lines of the previous speakers. I am very anxious to see both the Federal Government and the private sector bring to bear whatever efforts and resources can promote an equality of actual opportunities. I am not interested in seeing the kind of polarization of thought of American society at various levels when efforts are made to bring about an equality of forced results.

I have spent some time in my statement indicating what I think some of the options are for higher education in this area and what it should do. I will not take time to discuss those options here.

Let me also say that I am not one of those who rejects the proposition that the Government is no longer needed to combat racial discrimination or poverty or indeed the cruel problems that weigh heavily on those who are hurting and frequently helpless as they grow old. I think most Americans agree.

The fact is there is considerable evidence that a wide segment of public opinion in this country supports many of the various catch-up programs—for example, special assistance programs for minorities and women who have been disadvantaged by past discrimination. They have been supported by whites and blacks and by young and old people and by people in between, provided—and, Mr. Chairman, I think this is important—that they do not call for absolute preference of one group over another.

The polls have frequently and consistently revealed that more than 80 percent of the American people are against affirmative action when it is carried to the point that it would engage in racially preferential treatment or quota strategies that end in some form of reverse discrimination.

"Affirmative action" has become a code word. Everybody is for it until you ask what you mean by it. No one is a supporter of quotas, and there is a view abroad in the land that all we have to do is call quotas by another name, such as "goals" and "timetables" which must be met, and that somehow this shows that we no longer have to deal with the quota mentality. I do not happen to believe that.

The committee, I gather, is very interested in how we can break the vicious cycle of unequal employment opportunity that leads to unequal housing opportunity and unequal education opportunity that lead back again to unequal employment opportunity. Anyone who has lived for the last 50 years or so recognizes that these are not new questions. But I do not believe there are any magic solutions. There are no clear formulas, and there certainly is no single answer.

I want to stress again that I think what we are dealing with here when we talk about affirmative action, certainly as it has been practiced by many policymakers, is a form of demand supervision. I think it is now time to consider the supply side of the coin.

In point of fact, there really is a supply side problem. I hope the time has perhaps come when thoughtful and concerned people who want to examine this supply problem will not be considered racist.

If one were to take the question, for example, of why in some of the leading business schools in this country who are giving MBA's there are a declining number of blacks who are applying, one answer is that they discriminate in adminissions. Another answer is that somehow there is not enough student aid money. But from talking to a recent distinguished dean of one of these schools, I find that there is student aid money. That is not the problem. What is the problem?

One does not really know "the problem." There are many kinds of problems. One certainly is that many blacks, other minorities, and other people in our society are not getting trained in statistics, mathematics, and some of the courses that are absolutely essential for advanced work. That is the kind of thing that I think we need to talk about.

The problem of minority education happens to interest me as an educator. I do not think that problem has been solved at all, certainly not by pouring Government funds into more and more Government projects. The real problem, again, is to teach youngsters how to read and how to write and how to think.

I happen to think that Chicago's Marva Collins, who is a remarkably gifted teacher as well as an educational treasure, is inspiring proof that all a teacher needs, in her own words, to turn ghetto rejects into achievers is a blackboard, books, and a pair of legs that will last all day. I am sure you have had conversations or correspondence with her. Ask her sometime what she thinks of the Government programs and all of the kinds of things that have been done and why she believes that she can deal with these kinds of problems with ghetto children—disadvantaged children—and what her techniques are.

Mr. Chairman, I also would suggest that in looking at this whole problem the business community consider a variety of options that it might include in how one can best go about opening up and deepening the supply side commitment.

One of the interesting observations one can make—I have seen this in the San Francisco Bay area, and it is true all over the country—is that there are any number of organizations, such as Arriba Juntos in San Francisco, that are doing herculean work on shoestring budgets.

I wish it were possible, Mr. Chairman, for the Federal Government at some point to take a national inventory of individuals—such as Marva Collins, Lee Soto in San Francisco, and Malaka Fatar in Philadelphia—in the private sector, in the community organizations, who are doing the kind of work that gets very little publicity and attention. There are thousands of people out there, and we do not know enough about them and what they are doing. The Federal Government does not know what they are doing.

There has never been, to my knowledge, an activity or enterprise on the part of the Federal Government to find them, to draw attention to them, to help support them when it is necessary, to get them here to help this committee and the Senate understand what they are doing.

The CHAIRMAN. We will get them here. You do mention Lee Soto and Marva Collins. They are two prime examples of people who are doing a tremendous job in our society without asking for anything really. I think maybe that would make a very good hearing.

Mr. BUNZEL. One of the things that you hear in response to this kind of suggestion, Mr. Chairman, is, "But look, they are only a drop in the bucket. We have got hundreds of thousands of people who need help."

I think one ought to say in response that sometimes slow and solid results are better than magnified expectations. I think we ought to understand that it is not necessarily the question of what the Federal Government could continue to do, because we want to solve all the problems immediately; we need to take a look at a variety of programs that have not worked, and we need to begin to examine some of the possibilities.

For example, in the area of education I am very deeply aware of the fact that it is possible today in this country for those of affluent means to have choices of where to send their children to school. I do not find the choices that are available to the rich or even upper middle class families available to the poor or those in the working class communities, or even lower middle class communities. I think we are entering a decade when there is going to be more diversity of choice and opportunity.

I would like to conclude simply by saying that, as a person who benefited from it, I have a very warm spot in my heart for the GI bill of rights. I think it is a model that can be used to make it possible for more people who were disadvantaged and poor to have additional opportunities choices.

The CHAIRMAN. Would you change the present system of guaranteed student loans, grants, et cetera, into a GI bill type of situation pursuant to a voluntary service to the Government program? You see, GI's served in the service and gave so much time to their country. I do not think anybody has ever begrudged the GI bill to any GI, but there is an awful lot of criticism about the tremendous escalation of costs in some of these student loan programs and the tremendous abuses as well.

Mr. BUNZEL. Yes. I think that if we had the time and another forum that would be worthwhile. I suspect you have already given some thought to this, as to what kinds of particular public policy options are available.

One hears a good deal today about tuition tax credits and about voucher systems. If we take the voucher system itself, one of the reasons I am attracted to it in principle—although I have reservations about it in some respects—is that I think it does suggest that what we need to do is make it possible for people who simply do not have the means to choose what kinds of schools they would like to go to.

I also would be interested in whether or not there is a possibility for a voucher system—Barbara Lerner talks about this in her book—that is directed to students in the public school system who are poor and not doing well. Then they could avail themselves of a choice to get out and go to a private school.

I would also like to see whether or not it is possible for many poor and disadvantaged children in many of our big cities who go to public schools to go to schools outside of their own district—public schools—if that is what they would like to do.

The point is to try to broaden the possible opportunities, and this I think is where the supply side problem lies I think is what Marva Collins is doing, and this, I think, is what so many groups have to be doing.

[The prepared statement of Dr. Bunzel follows:]

A STATEMENT PREPARED FOR THE SENATE LABOR COMMITTEE

by

John H. Bunzel

"It is possible," R.H. Tawney wrote fifty years ago, "that intelligent tadpoles reconcile themselves to the inconveniences of their position, by reflecting that, though most of them will live and die as tadpoles and nothing more, the more fortunate of the species will one day shed their tails, distend their mouths and stomachs, hop nimbly on to dry land, and croak addresses to their former friends on the virtues by means of which tadpoles of character and capacity can rise to be frogs."

As the late Professor Charles Frankel has reminded us, Tawney was speaking of the notion of equality of opportunity, which has played such an important role in the defense of our social and economic way of life and, in particular, of old-style free-enterprise capitalism. Argue with a defender of this economic system and he would have told you in the past, as he will tell you now, that "the inequalities of capitalism represent the working out of equality of opportunity."

As it turns out, equality of opportunity has been embraced by virtually every one. Socialists, of course, maintain that it is only a fiction and a slogan used by capitalism to hide its true nature, yet they go on to claim that true equality of opportunity will be realized in a socialist society. Not surprisingly, democrats and anti-democrats, socialists and free enterprisers, accept the ideal, differing only on what is believed to be the best kind of society to achieve it.

It is no secret that there is an effort under way in this country to redefine the meaning of equality. In the 1960s, the commitment of the people and their representatives in Congress to equality of opportunity led to a number of actions and policies designed to eliminate discrimination against minorities. But today in many quarters the principle of equality of opportunity

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is being replaced by another -- namely, equality of results. It is a transformation of enormous proportions. We have moved from eliminating discrimination to guaranteeing representation of groups. The long-standing principle of professional qualification or individual achievement has been subordinated to the new principle of group identity. That is why there is so much talk about quotas. Group representation has become the predominant concern. Many of us remember when an individual was discriminated against because of the particular group to which he or she belonged -- and we took successful steps to halt any actions that would bar an individual from, say, a college or university because of a particular group attribute.

Now we are caught in the winds of a great reversal. We are told that a person must be given a place or position precisely because that person belongs to a particular group. We are frequently told that preference must be given to certain persons by virtue of their group membership. Although the practice of preferential treatment is opposed by most Americans, it is urged upon us by certain spokesmen for civil rights, feminist and liberal organizations in the name of the new equality.

However, I believe the idea of equality is too important in the history of the American experience to be left in the hands of those who would twist its meaning and take it so literally that it runs the risk of becoming an isolated ideal. Equality cannot be seen in isolation, any more than it is an absolute. What I am saying is that equality will lose its integrity as a concept central to democracy if it is not related to other humanistic values such as fair play, even-handedness, and freedom of the individual. Equality has no meaning in a vacuum. Either it can be coordinated with our other cherished beliefs or it becomes a kind of verbal whirlpool into which all other values are drawn, only to be destroyed.

In my own approach to equality of opportunity and what I believe it has stood for throughout our history as a nation, I think of it more as stating a direction of effort than a goal to be fully achieved. Although a provocative theoretical issue, it is also very much a practical matter. Thus, in my view, equality of opportunity does not need or call for uniformity, either of environment or achievement. It looks for and urges a wide variety of opportunities and, because freedom and diversity are also central values to be preserved, the "individualization of attention" in schools and jobs. The fact is that justice also consists in treating people differently. My own equalitarian values lead me to want to see conditions brought about that will make it easier for people to shift directions or change their plans so that they can "try themselves out" in new jobs or settings. Men and women from all walks of life who have talent should be encouraged and have the opportunity to use it. Equal opportunity should allow every one to believe that doors are open and that no one will be shut out on the basis of birth, wealth or skin color. My notion of equality of opportunity would foster a greater equalizing of social conditions but it would not promise a state of affairs in which (to borrow a phrase) "it is just as easy for those less favored by circumstance as for those more favored to satisfy whatever wants they may happen to have."

I was a strong supporter of the Civil Rights Act of 1965 because its motive force was to recognize at long last the elementary justice of granting to all of our citizens -- most especially, the poor and the powerless -- the right to vote, to enter public accomodations, to find jobs and to buy homes. Title VII made it clear that what is prohibited is discrimination against anyone on the basis of race or sex. One of the basic flaws in affirmative action is that government officials who investigate hiring and promotional practices rely heavily on a "numbers" definition of discrimination. The implication is that the real though unstated aim of federal policy is not to promote an "equality of actual opportunities" but to bring about a dramatic equalization of conditions for certain groups through preferential hiring and some form of proportional representation -- what the Carnegie Commission has called an "equality of forced results." In short, "treating equally" has been subordinated to "hiring more."

As an educator and former academic administrator, I have given much thought to what federal law and policy should require of colleges and universities in the 1980s in the area of equal educational opportunity. I would offer the following as some general guidelines:

-- Higher education should be expected to exhibit and foster an attitude of cooperation with the national policy of equal opportunity at all levels without regard to an individual's race, religion, color, or national background.

-- Higher education should be expected to oppose all practices that give persons any advantage, or impose upon them any disadvantage, because of anything extraneous to their own merits, that is, their skills, abilities, achievements, and promise. At the very least, any preference or disadvantage based on race or sex should be sustainable only upon a showing, by clear and convincing proof, that it is essential to an over-riding public purpose that can be attained in no other way.

-- Higher education should concentrate its efforts on its essential mission -- education. It should not be asked to compromise those efforts by favoring experiments or policies that jeopardize them. Government regulations or guidelines that affirm the principles of nondiscrimination and equal opportunity are fundamentally in error in that they establish as the major goal an immediate increase in the numbers of women and minorities on faculties and staffs and in student bodies. Colleges and universities must continue to seek a more cosmopolitan membership, but this effort should be viewed as an expected and desirable by-product of proper policy rather than as a primary, if not exclusive, goal. An affirmative action program should clearly state that an academic institution serves society best by providing quality education to all eligible students on the basis of equal access and equal treatment. That is its primary function. It is also the principal way it can contribute to the mitigation of inequalities in the country and should be emphasized in any policy statement on equal opportunity. If the educational mission were regarded as paramount, many of the ambiguities and contradictions of affirmative action regulations and enforcement would be avoided.

-- Higher education needs to do more to reach effectively people who have been denied the benefits of higher education, or who have had special barriers placed in their way. Any erosion in the quality of academic programs cheats them and is inconsistent with broadening the opportunity for quality education.

-- Congress can help secure these objectives by well-conceived programs of financial support. The greatest hope lies in a combination of long-term efforts that range from introducing minority high school students at the earliest age possible to the opportunities available to them in medicine, law, teaching, and so on -- to motivating those with potential as college undergraduates to pursue careers at the professional level so that the ranks of the truly qualified will be legitimately expanded. There should be guidance and assistance for people before they become incapacitated students. We need to rescue good minds at the high school level before they become dulled and ill-equipped to go on to college. The federal government, state legislatures, and private foundations, as well as business and industry, should make available the necessary resources as further confirmation of our active commitment to provide increased employment opportunities for women and minorities in higher education in fact as well as in legal theory.

-- Congress should insist on adjudicatory procedures that accord with due process and that permit colleges and universities to receive a quick and fair (and independent) determination on issues of pertinency and privilege with respect to demands for files and records. This is an area where the usual rule of very broad delegation under a generally stated statutory policy is not good practice. Congress should be explicit about what it expects and what it does not expect.

-- Everyone -- schools, students, employees, citizens, and federal agencies -- should be able to determine from a regulation or statute what constitutes compliance. Nothing so vague that it requires guessing should be subject to enforcement. Nor should there be grossly overlapping areas of enforcement among the federal agencies working in the same area, with the predictable conflicts among them over interpretations, patterns of enforcement, and the like. This, of course, is nothing more than the standard jurisprudential rule about clarity in law making.

-- Basic objectives should not be drowned in an administrative maze of requirements and reports, or in rules so arcane or impractical (or both) that compliance becomes impossible or so many resources must be diverted to achieve it that the basic objectives are defeated. What is at issue is a theory of limits -- more precisely, the need to impress upon the federal government that it must define its proper role in the affairs of higher education by setting realistic and necessary limits to the regulatory process and to the imposition by the bureaucracy of comprehensive and cumbersome rules. Many legitimate social goals could be more responsibly and effectively achieved (and at far less administrative cost) if the critical decisions in education were left to those on the campus whose judgment and informed intuition are guided by long years of experience rather than to government officials who are unfamiliar with the major academic functions of a university.

For those who believe that a decent and just society cannot turn its back on the citizens of this country who suffer from the crippling disadvantages of heritage and circumstance, the question of what the federal government and the private sector can do to increase economic and social opportunity remains a pressing concern. Regrettably, many of the government's interventions and programs in the last fifteen years or so have failed to produce lasting results. Furthermore, many of the missionaries of the equalitarian movement as they have sought to lead it -- I think of everything from forced busing to a myriad of other efforts to bring about social change through a succession of rules, procedures, and investigatory techniques -- have proceeded as if they did not know or perhaps care that their zeal and activism were so often opposed by large majorities of Americans. Thus it seems appropriate for the Congress to take a fresh look at the meaning and direction of "the egalitarian revolution."

I do not wish to be misunderstood. I reject the proposition that the government is no longer needed to combat racial discrimination or poverty or the cruel problems that weigh heavily on those who are hurting and frequently helpless as they grow old. Most Americans agree. The fact is that federal compensatory or special assistance and "catch-up" programs for women and minorities who have been disadvantaged by past discrimination have long been supported by both whites and blacks -- provided they do not call for absolute preference over whites. (Polls have repeatedly and consistently revealed that more than 80 percent are against affirmative action when it is carried to the point of reverse discrimination.) Besides, "race-oriented" affirmative action policies, while they may have benefitted some upwardly mobile and college-educated "talented blacks," have done little to help poor blacks and other minorities. If University of Chicago Professor William J. Wilson is right, affirmative action has unintentionally contributed to the "growing economic class division within the black community."

What, then, can be done to help improve the conditions of those who are still without the education, skills and habits to compete successfully for an equal chance in our society, including the millions of Americans who are caught up in the pathology of poverty, violence and drugs? How do we break the vicious cycle of unequal employment opportunity that leads to unequal housing opportunity, unequal education opportunity, and back to contined unequal employment opportunity? For anyone who has lived through the past fifty years of well-intentioned government programs and social experimentation, these are hardly new questions. The stubborn truth, however, is that there are no magic formulas, no clear government-engineered solutions, and certainly no single answer. As an example, it is no longer credible or persuasive to explain all of the severe economic problems of the black underclass by invoking the all-purpose charge of racism and discrimination. Even if all discrimination were to end tomorrow, the conditions of most blacks would not be suddenly changed.

What follows, Mr. Chairman, are some thoughts (let me be the first to say that they are not fully developed) about how we might make the best use of governmental and private resources to achieve the national goal of expanded opportunities for all Americans. They are intended to be suggestive, not definitive. It is clearly not an exhaustive list:

-- Affirmative action as it has been practiced and enforced by policymakers in the federal bureaucracy has amounted to a form of demand supervision. What is needed now is a consideration of the supply-side of the coin -- that is, some attention to what efforts can be undertaken to increase the supply of qualified women and minorities to compete for jobs, social benefits and other opportunities. When asked why there are not more blacks on college faculties, the answer of the affirmative actionists is that we need more and tougher demand management. Yet there really is a supply-side problem. Perhaps the time has arrived when thoughtful and concerned people can examine the whole issue without being called racists.

Consider the question of why it is difficult to get qualified black candidates into MBA programs in many of our leading university business schools. One familiar answer is that there is not enough student aid. But the fact is that there is student aid money. This is not the core problem. A more fundamental and serious explanation is that those who would like to be admitted do not have the quantitative skills and other academic prerequisites. In other words, what is needed is a heavier dose of courses in statistics and calculus in high school. It may well be that many blacks who are educationally disadvantaged know that they cannot compete successfully in a first-rank business school. (Some blacks who graduate from college with a BA degree may also feel that they can already get a good job and that an MBA degree is not worth the additional years of study. But that is a different story.)

-- The problems of minority education have not been solved by pouring government funds into more and more government projects. The real problem is how to teach youngsters to read and write and think. Chicago's Marva Collins, a remarkably gifted teacher as well as an educational treasure, is inspiring proof that all a teacher needs to turn ghetto rejects into achievers is "a blackboard, books and a pair of legs that will last all day." She told a U.S. House subcommittee on education that for two decades "pseudo-educators, aided by federal dollars, were laying the groundwork for our present crisis by lowering educational standards to the point of making school a recruitment center for failures." Attention should be paid to this remarkable woman when she says (and she speaks for millions of parents and teachers all over the country) that students are "victimized by an educational system that offers open admissions, social promotions, Mickey Mouse courses and certificates. . . based on the duration of enrollment rather than on earned credits or evidence of competence."

The public schools have not done well in the education of poor and illiterate minority children, as the high rate of functional illiteracy sadly demonstrates. A way must be found to give parents who live in bleak, depressing neighborhoods a more flexible choice of schools -- one recalls, for example, the G.I. Bill, which put the choice of going to college in more than the hands of the rich. This is not a call for destroying the country's public education system, but a recognition that no one educational setting or method fits all children and that the challenge to educators in the next twenty years will come from new opportunities for diversity.

-- One of the goals of President Reagan is to place heavy reliance on individual and local action to deal with national problems -- in his own terms, to shift power and responsibility back to the people. Among other things, this is what the budget cuts and tax reductions are all about. The so-called "new federalism" will of necessity involve a continuous probing of the private sector to determine what responsibilities it is able and willing to assume. It is possible, of course, that what the Reagan Administration thinks the private sector can do may turn out to be as much of an illusion as was the illusion of liberal Democrats about what the Great Society could accomplish. Time and results will tell.

As a result of federal budget cuts that have brought about a decline of local activities and services, the Administration must encourage business leaders (among others) to fill the gap by meeting its community obligations. If business does not respond in a visible way, the public will not only continue to harbor generally negative attitudes towards business but to reassess its backing of further tax cuts, more deregulation and other pro-business policies. C. William Verity, chairman of Armco, Inc. and recently appointed head of the President's Task Force on Private Initiatives, has said that many more corporations should move their level of community support up to 2 percent or more of pretax income. He also suggests that corporations can promote volunteerism in various direct and indirect ways. Xerox and several other companies permit their managers to take up to a year's leave of absence for public service. Business can also encourage community involvement simply by letting employees know that it is expected of them. "If we can make our people realize that their role in the community is being evaluated by their supervisors," Verity says, "and that their success with the company depends in part on their ability to play a part in community affairs, we can expect better use of the human resources available to public agencies." These are the kinds of ideas which, if acted upon, offer promise of enlightened leadership from enlightened businessmen and women.

— If one examines the plight of the underclass in American society, it seems clear that most, if not all, of the government's social programs have been directed at others. One of the lessons Marva Collins has taught us is that the only way to work with those who are really deprived and who have not been socialized into the middle-class is through people who know them and can train them. It is the only way that works in reaching down to, say, hard-core blacks in their twenties and thirties. One thinks of the religious-linked foster homes in our major cities that take in young people for four or five years out of a genuine concern for the abused and abandoned. Many of them go to school half-time and work half-time -- and they now have a family. It is the minister who connects with them.

In Richmond, California, the Standard Oil refinery has been working with the city schools, providing career guidance and counseling, hiring young people in the summers, and then training them after they finish high school. These are not college-bound students. They are mostly black, highly motivated, and they want (and get) a job. Today, several years after the volunteer program began, there is a good sprinkling of blacks as supervisors in the refinery. For years Kaiser-Aluminum has been very active with the Oakland high schools, offering minority youth summer work and then later hiring them. One wonders what it would take to get more large corporations involved in training and placement.

Across the Bay, in San Francisco, Lee Soto heads up an organization called

Arriba Juntos, a non-profit educational and charitable corporation that helps provide education, training and employment in the private sector for people who are socially and economically disadvantaged. Chartered by the state and the federal government in 1963, most of the peer counselors are credentialed teachers who have grown up in the streets of perhaps came out of the Mission. With a staff of 30 people -- 13 have recently been released because of budget cuts -- Mr. Soto is trying to cut down on a reliance on federal grants. "You lose your independence," he says. Their biggest program is on-the-job training, which includes everything from remedial English and mathematics to teaching people how to speak, how to dress, and how to be on time. "We employ an old American philosophy," Mr. Soto explains, "If those who come here for help don't pay attention or learn, we get rid of them. We believe in the work ethic." In the last eighteen years, over 2000 people have been trained and placed in jobs. It has cost the taxpayer a little over $1 million but has brought back into the economy more than $5 million taxable dollars. To those who might say that these local efforts affect only a small number of people who need help, perhaps the best response is that these small deeds are better than magnified expectations. Furthermore, we are talking about a long-term process of trying to deal with enormously complex problems. Incremental but solid gains are worth much more than a big splash that fails.

Mr. Soto would like to set up a program to train people in computers for today's technological market -- a more modest version of the computer training center in Oakland recently unveiled by the Bay Area Urban League and 15 national and local corporations that is designed to give high level technical skills to unemployed adults. But he also needs money to get word processors and other equipment. "We would prefer a contract instead of a grant," he says.

"A contract holds you accountable, and you know you must perform and maintain standards." Because of the development of computers and software, more people are also working on learning research. The private sector, through a network of learning centers, can get into the business of improving the technology for the disadvantaged or those who have learning disabilities. With imaginative planning and financial help, learning centers could become places to which high schools could send students who want to learn some basic skills that would lead to a job.

People like Lee Soto and Marva Collins cannot be invented. Nor can they be given institutional or bureaucratic form. Each is a kind of secular saint. Their great virtue is that they want to help people without making a buck out of it. They are not hustlers. Furthermore, there are many others like them all over the country. A vitally important task that the federal government could undertake is to find such people -- very simply, to make a national inventory of this valuable human resource -- and then proceed to publicize the achievements of these men and women and the groups they work with. Beyond that, the government should give special attention to what actions it can take, including necessary funding, to ensure that these successful and productive community-based organizations that are operating on shoestring budgets will not only not be allowed to fail but will be encouraged to expand their job training and educational programs where this seems possible and appropriate.

Writing in the March 9, 1981 issue of Fortune magazine, Walter Guzzard, Jr. listed some of the merits that lie in the so-called "targeted" approach -- that is, limited and carefully tested local programs, financed by government or private enterprise, aimed at specifically identified community groups that have helped the hard-core unemployed or welfare mothers make the transition to permanent jobs. If it has not already done so, this Committee should explore with representatives of these different organizations what kinds of federal help will work (and will not work) in, say, assisting minority-run businesses in our inner cities to survive and succeed. I am sure I need not belabor the point that in a period of rising unemployment a lower minimum wage for teenagers might help thousands of them to get a job and/or (depending on what is possible) that the use of tax credits might encourage employers to hire disadvantaged young people.

There are many critical issues facing the country today which will have to be resolved in the next decade and beyond. I do not believe that, by itself, the market place can come up with all of the answers or that it is a sufficient guide to everything that must be done. The private sector -- in particular, the business and corporate community -- will need to develop a moral vision of its own to match the vision and dedication of the "new class" of reform-minded activists who seem to think that the best way to reshape our society is to redistribute political power to the government.

It will have escaped no one's attention that one of the struggles in our society is to see whether the government will be the employer of the first or last resort. The government, though, is too big. Thus I would prefer to see initiatives taken in the private sector, although I still recognize that a creative though more limited (rather than an habitual) use of public authority remains an important instrument of our national purpose. I strongly believe that a vibrant economy is the best avenue of mobility. But mobility means such things as getting men and women who are out of work where the jobs are. It may be that people do not lack opportunity but are simply not where the opportunities are. Thus one of the responsibilities of both the government and the private sector is to work together to facilitate this mobility -- more simply stated, to get people to move. This is a national problem. If the government takes the lead in establishing the climate for the necessary enterprise and action, it will have helped produce national benefits.

But there is a caveat, indeed there are many. As Susan H. Gray and Louis Bolce point out ("Not That Job, Thanks," op-ed page, New York Times, December 5, 1977), "Not all sub-cultures in our society define working for a living as central to their life orientation. This is particularly so among the lower class and among some women and youth." There are hundreds of thousands of persons 18 years or older who prefer to live on public assistance or unemployment compensation rather than taking jobs that do not suit their skills or interests. Thus Gray and Bolce conclude that any policy that ignores the trend toward voluntary unemployment will guarantee its own failure. "If the government attacks the unemployment problems through a campaign to create jobs of only minimum desirability (for example, through the Humphrey-Hawkins bill), the outcome will fall short of the policy goals and will probably make matters worse."

As I have tried to suggest, it is time for all of us who are genuinely interested in the plight of the poor, the disadvantaged and the alienated in this country to break away from many of the old, confining shibboleths and habits of thought when we consider how equality of opportunity can be enhanced and sustained for millions more of our citizens.

The **Chairman**. Thank you, Dr. Bunzel.
Dr. Osterman.

STATEMENT OF PAUL OSTERMAN, ASSISTANT PROFESSOR OF ECONOMICS, BOSTON UNIVERSITY, BOSTON, MASS.

Mr. **Osterman**. Thank you, Senator.

I would like first to make two preliminary points before I move on to my main issue. First, I want to simply emphasize, as I am sure you know, that race and sex discrimination do remain serious problems today. For example, at all educational levels the unemployment rate of young blacks is well over the unemployment rate of young whites, including, Senator, college graduates.

The **Chairman**. But that does not necessarily mean that that is as a result of discrimination. That is one of the problems. I think that is what Dr. Bunzel has been referring to and some of these business leaders have been referring to. Some may be the result of discrimination. You and I both know that discrimination exists. That is part of the reason we are holding these hearings—to find the best possible way of getting the best possible approach to provide for employment of women and minorities.

I always have trouble with the statistical analysis, because statistics are statistics are statistics. But I have interrupted you too early in your remarks. Go ahead.

Mr. **Osterman**. May I have a minute back?

The **Chairman**. Yes, you may as a matter of fact.

Mr. **Osterman**. If you were willing to stipulate the point, and as I am sure you understand, that there is some discrimination—and I do not claim that all of the observed statistical disparities——

The **Chairman**. I have never been unwilling. You see, my purpose in holding these hearings is to help to reach my commitment to the national goal of greater employment opportunites for women and minorities. On the other hand, I am going to seek to achieve that goal, and I am going to seek to achieve it in a reasonable, workable, constitutional way.

But I have a lot of problems when one person in our society is preferred over another person in our society just because of the color of his or her skin or because of sex. Frankly, that bothers me. I think that is also discrimination, any time you have so-called protected classes, preferential treatment, or you have quotas that have been decried here, or you have what are in effect quotas through a system of goals and timetables.

This is not a simple problem. We will give you 8 minutes now. You will never be able to convince Mr. Webber that he should pay the price that maybe ancestors or even nonancestors 100 years ago discriminated against blacks.

Somehow we have got to resolve this problem and do it, I think, in a constitutional manner, considering that the Constitution was meant to be colorblind not color-conscious. I do not know how. If I knew how, I would not be sitting through these hearings. I have all I can handle without these hearings, but hopefully these hearings will help us to find out how. I think we have had some excellent suggestions so far.

Just for your information as well as others, when I first started raising this problem, which was a number of years ago, I was pretty well committed to getting rid of all affirmative action actions, because I feel they are just reverse discrimination programs, and I am not sure that still is not the best thing to do if we can come up with ways of enforcing title VII and other appropriate equal rights provisions in present law, and there are plenty of them. As I have gotten into it, I realize that there is discrimination and we have to do something about it.

In the Judiciary Committee we came up with the equal protection amendment, which would do away with all affirmative action programs. We held very volatile hearings on that, where I think both sides made some interesting points. Here what we are trying to do is see if we can come off that a little bit and resolve this problem for the benefit of women and minorities but not to the detriment of everyone else.

Unfortunately, we have a lot of people out there who feel that they are being detrimentalized as a result of Federal Government intrusion through these programs, giving preferential treatment to one American over another. That is where I do have some difficulties. But go ahead, and let us start the green light over again. I just wanted to get that on the record.

Mr. BUNZEL. Would you be willing to withdraw that word "detrimentalized," Mr. Chairman?

The CHAIRMAN. Yes, I would be glad to. That was a bad word, I have to admit, but they feel that they have been discriminated against; let us put it that way.

Mr. OSTERMAN. Thank you, Senator. I will try at the conclusion of my remarks to respond to some of your thoughtful comments concerning goals and timetables. I do have some thoughts on that.

Let me then simply skip ahead. I do want to give an example of an instance in which affirmative action has been very effective. That is the A.T. & T. case in which, in 1973, a consent decree was signed. To provide some numbers, in 1972, 338 women were in middle management and above in A.T. & T. In 1978 it was 1,300. At entry level management the numbers jumped from 29,000 to 40,000; at second level management, 4,000 to 11,000; inside craft jobs 2,000 to 8,000.

The CHAIRMAN. Let me interrupt you at this point. I am sorry to do this. Is that because of the OFCCP?

Mr. OSTERMAN. No, that is because of the consent decree signed with EEOC. I do think that does illustrate that affirmative action as a general process can be effective in increasing opportunities.

The evidence I want to present today is based on my research, which shows that for both firms and target groups affirmative action programs have substantial benefits.

I think Mr. Graham in his earlier remarks was quite right to indicate that many firms tend to overlook the benefits that can be achieved by affirmative action. Affirmative action programs create job ladders; affirmative action programs start companywide bidding schemes so that more jobs are open; affirmative action programs assure that some jobs are no longer dead-end jobs—clerical jobs, for example.

These improvements in personnel practices make for more loyal workers, and they make for more stable workers. Most fundamentally, it reduces turnover. My research shows that modest increases in OFCCP activities—compliance reviews, letters of agreement, and so forth—are associated with nearly 20 percent reductions in female quitting—turnover. This saves firms' money. Turnover is associated with lost training costs and turnover is associated with a less committed workforce.

Another benefit is that affirmative action moves firms in directions which help them ease labor shortages. For example, in Massachusetts where computer programers are in short supply many firms are now training clerical workers in programing skills. In part this is the result of affirmative action programs, in the sense that affirmative action programs have nudged firms, which otherwise would be unaware of these potential labor supplies, in the direction of thinking about women, clerical jobs, and so forth.

Again returning to Mr. Graham's remarks, I believe that the firms that he represents are by now sophisticated enough and committed enough so that they, in fact, may not need the stick, but the firms that he represents account for a relatively small fraction of employment. Many other firms throughout the country—small firms, medium-sized firms, and some large firms—have not reached that level of sophistication.

In conclusion, I do want to make four or five points. First, continued progress depends on atmosphere, as Senator Hatch noted earlier, but that atmosphere does not come out of nowhere. That atmosphere is created by a sense of real Federal commitment.

Second, small firms as well as large firms should be treated as targets, in the sense that small firms provide a significant faction of employment, especially of young people.

Third, I think a useful and positive suggestion would be to upgrade the enforcement powers and the staff of regions, because the regions know the local labor market best.

Fourth, there are ways in which the adversarial relationship between OFCCP and firms can be reduced. For example it might be possible to consider a scheme in which firms with particularly good records over a few years are exempt from annual reporting requirements, but that should be treated as a reward for good performance and firms, of course, should never be permanently exempted.

Finally, Senator, let me just say a few words about statistics, goals, and timetables. When you are dealing with very large firms, there is simply no way, other than through a statistical analysis, that one can discern whether or not discrimination occurs. It is often the case in these lawsuits and OFCCP activities that firms, through statistical analysis, are able to show that they have not engaged in discrimination.

A number of banks and insurance companies that I know in the Boston area have come quite well out of OFCCP compliance reviews, but when a firm employs 10,000 or 20,000 employees and when the labor market from which it draws is up to several million people, one cannot look at an individual case-by-case record of behavior and arrive at any conclusion.

As far as goals and timetables go, if a firm has been found guilty of past discrimination, the only way to monitor its progress in the future is through goals and timetables. Otherwise, each year the case would have to be reviewed. If it was a lawsuit, it would have to be undertaken again. If it was a compliance review, it too would have to be undertaken again.

Only through goals and timetables can progress be measured. It is the only feasible method. In no other area of government and law do I think we would be willing to take someone's word that, "Yes, I have been bad in the past, but I promise I will be good in the future." Goals and timetables are essential for monitoring progress. I would agree that they need to be administered with a certain amount of flexibility, that they should not be rigid, and so forth, but they nonetheless are an essential tool.

To summarize I would say the following: Affirmative action programs work. They have benefits for the firms as well as for the protected groups. Many firms do not fully recognize these benefits, and one thing that the Federal Government does is to nudge firms in the direction of recognizing those benefits. Certain tools, such as goals and timetables and statistical analysis, are essential.

Finally, there certainly are ways in which the purely adversarial relationships can be reduced. I gave several suggestions. But I do think we need to maintain a strong commitment to the program.

Thank you.

[The summary of Dr. Osterman follows:]

SUMMARY OF TESTIMONY

BY

PAUL OSTERMAN*

TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

Most discussion of affirmative action programs centers upon a debate between advocates who cite evidence that minorities and women continue to suffer from employment discrimination and opponents who either deny this or claim that the costs of the programs exceed the benefits. A subsidiary debate rages concerning the appropriate remedies: whether the goals and timetables are appropriate and whether the enforcement effort is unnecessarily burdensome.

My own view is that discrimination continues to be serious and that by and large enforcement strategies need to be strengthened, not reduced. However, in this testimony I want to offer another perspective. I will discuss evidence demonstrating that affirmative action programs have substantial- and not always recognized- benefits for employers. These benefits are potentially quite large and provide justification for continued effective Federal efforts.

The most significant of these benefits is that affirmative action programs considerably reduce quitting by affected workers. The research paper which I am submitting for the record demonstrates that for women workers increases in the number of OFCCP compliance reviews and letters of agreement in their industry of employment is strongly correlated with lower quit rates. I believe this finding would also hold for minorities. This finding survives careful attempts to control for other factors. A modest increase in enforcement is associated with an 18% reduction in female quitting.

The significance of this finding is:

(1) It demonstrates that affirmative action programs succeed in encouraging firms to establish job ladders, training programs, and other positive personnel policies which increase employment opportunities and reduce quitting.

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(2) By reducing quitting, firms save lost training costs and benefit from a more productive workforce. The costs are saved because less frequently do firms train workers only to see them leave; the workers are more productive due to longer tenure with the the firm and greater commitment.

(3) Male workers may also benefit by the more rational personnel practices which affirmative action programs stimulate.

There are additional benefits to firms from affirmative action programs. Most prominent is the increasing of the supplies of labor available for shortage occupations. For example, partly as a result of affirmative action pressure some firms are training secretarial and clerical staff for computer programming positions. Another benefit is that the compliance process itself often encourages firms to create a more rational and equitable personnel system with benefits that extend beyond the target group.

If these benefits flow from affirmative action why do employers not freely undertake these programs? Why is coercion necessary? The most likely explanation is that firms may react to what they perceive as the short term costs of the program without fully considering the long term benefits. This possibility is given weight by recent evidence that American firms tend to overvalue short term profits relative to future oriented investment. Furthermore these short term costs are often exaggerated. A recent study by the Business Roundtable found that for forty-eight large firms the cost of implementing affirmative action programs in 1977 amounted to eight tenths of one percent of capital investment.

The case for or against strong affirmative action programs should not rest on these hidden benefits. Larger issues of equity are at stake. However, these benefits are real and a useful function of the Federal Government is to encourage long term investments in human resources which short term considerations might otherwise prevent.

The **Chairman**. Thank you, Dr. Osterman.

You estimate that companies currently spend less than 1 percent of capital investment. I think that is an interesting statistic. Would not a more valuable statistic be the annual per capita cost of affirmative action programs, or what is the percentage of the corporation's annual expenditures spent on affirmative action? I could also add, How much money should corporations spend on affirmative action? Do you have any estimation that you would recommend?

Mr. **Osterman**. Senator, that figure is actually drawn from a Business Roundtable study that found that, in fact, among all the regulatory programs affirmative action appeared to be the least costly. I took them at their word as to how they measured cost. I would argue with some of the definitions of "cost." I regard that as a fairly low figure. Offsetting that figure are some of the benefits I have talked about, such as reduction in turnover and so forth.

I would be pulling a number out of my hat to come to you and say, "The proper figure is" so and so, but I do think that their out-of-pocket costs tend to be exaggerated and that there are real financial benefits to firms from effective affirmative action.

The **Chairman**. Dr. Bunzel?

Mr. **Bunzel**. Mr. Chairman, may I make one comment here? In one sense the question is not the only important one. In some respects affirmative action works. Also—let us be honest about it—so do quotas work.

The **Chairman**. Sure.

Mr. **Bunzel**. If you want to adopt a quota, it can work, it will work, it has worked. But I think there is also a larger question involved here, as to whether or not bad means make for good ends.

The **Chairman**. It works both ways, forward and backward.

Mr. **Bunzel**. It can work for a variety of reasons. Those who prefer to concern themselves with ends only may very well say, "The means we do not need to be too concerned about, because the ends are the only concern we have," and so they change the name, soften the title, or whatever can be made to work. It will work, but that does not solve the constitutional or the moral question.

Mr. **Chairman**. I remember when I was at San Jose State as president in the 1970's. An HEW regional office in the Midwest came out with some guidelines. These were serious guidelines. They were in writing, and you probably have seen them.

The question was how we would increase the numbers of women and minorities on the faculty. The guideline that came out for the Midwest HEW regional office was that an academic department ought to consider the least qualified person in that department as the standard by which they could measure those whom they wanted to hire who were women and minorities. This was a serious proposal.

Those of us in the academic community thought this was a joke at first. You could imagine academic departments holding meetings trying to determine, the least qualified person in this room and use that as the determination of how more women and minorities could be admitted. It was madness.

The **Chairman**. I suggest those meetings go on all the time in academia. [Laughter.]

Mr. **Bunzel**. Yes, we do not need guidelines for those kinds of meetings; you are quite right.

Mr. **Osterman**. That may be how I got my job. [Laughter.]

The **Chairman**. Please do not say that. We chose you because you are an expert in this area.

Mr. **Bunzel**. The guideline was rescinded. The only point I want to make is this: Affirmative action must embrace the notion of competitive equality of opportunity. At our university, Mr. Chairman, we made it possible to bring about a plan whereby, on the one hand, every department had to be, by university policy, involved in an equal opportunity search and a genuine good-faith effort to recruit, and there had to be proof of this.

Those who were recruited were sent forms, because we were asked to provide data in terms of their background, race, and gender. Some of us did not like this, but that was the law. We asked these individuals to supply that information to the affirmative action office, so that we would comply with HEW guidelines.

But we did not say to the history department or the biology department, "Now, we have all of these people broken down in various forms. You must have some of these [indicating left] and some of those [indicating right.]" The standard we insisted upon was that it had to be the best qualified person. Has the academic world always lived up to that? No, it has not. But that does not invalidate the principle.

The **Chairman**. I guess we could force everybody to be equal in society, if we had enough guns, enough armies, and enough police power to do so, but that is not what our constitutional life is supposed to be. I think you make a good point.

Our committee's effort should not be viewed as a backing away from the basic intent of Executive Order 11246, which is to get jobs for women and minorities, to expand those opportunities for women and minorities. But I think a revitalization of that commitment, and I think in a manner consistent with the basic values of all Americans and the values they believe in, is fairness and equality. There are some who do not, but I think, as both of you indicated, most people do.

Hopefully by the time we are through with the oversight of OFCCP we will have a revitalized effort at furthering employment opportunities for women and minorities. I do not know. I am sure trying. That is what we are trying to do here.

Our focus in the hearings today and last time really is, specifically, what could the OFCCP be doing to increase opportunties for women and minorities? In light of your statement in particular, Dr. Bunzel, if the core problem could be a lack of early introduction to academic courses to prepare one for higher education, what role do you feel that the OFCCP could play to help fill that basic need?

Mr. **Bunzel**. I do not know that the OFCCP can itself, by itself, address that problem, except by trying to understand several basic principles here. Anything that an agency of this kind is attempting to do ought to have at least the support of a large segment of the American people, when we are trying to expand opportunity and indeed trying to redefine options.

It seems to me, further, that the major answer to the question that we are going to have to depend upon—and there are no guarantees here—is whether or not the economy, a vibrant economy, can provide an abundance of job opportunities. I happen to believe that that is still the best source of hope. But there is a difference between whether or not you can have hope and whether or not you can always have public policy solutions to a whole range of problems.

One can go back in American history, Mr. Chairman, and take a look at the desperate plight of the Irish Americans in this country about a century ago and the very severe kind of poverty and indeed some of the riots that took place, and then ask why this group and many others have come into the mainstream of American life with the success they have.

I do not think the answer has been because Government had an affirmative action program. I am not suggesting that affirmative action cannot help in creating opportunities, but I think that the various agencies of the Government will have to look at, not the demand supervision, not trying to enforce through regulation a certain set of goals, and not trying to coerce. That will work, but I think the price is that you will find less rather than more support and a growing cynicism about some of the results.

Mr. OSTERMAN. Senator, may I make an additional comment?

The CHAIRMAN. Surely.

Mr. OSTERMAN. I think affirmative action does work and it has been shown to work. The question you are raising is whether the costs exceed the benefits.

The CHAIRMAN. That was not my question.

Mr. OSTERMAN. OK, but I do think that I can marshal evidence and many other people can marshal evidence. The *A.T. & T.* case was one. My research on OFCCP is other evidence.

The CHAIRMAN. But just so you know, the question I am raising is a constitutional question and a moral question: Are the approaches we are taking constitutionally sound, right, and moral? I have heard arguments on both sides of that issue, but I really have difficulty in the framework of the Constitution saying where we should give preferential treatment to anybody, one American over another. And I am not sitting here alone. There are a lot of people who are very committed to civil rights, as I am, who feel very much like I do, some a lot stronger than I do.

Mr. OSTERMAN. The question I would raise in response to that is this: Should we take a firm's word for the fact that they are going to behave well in the future as earlier witnesses subjected? They said, "We are good folks; believe us; we will do well." I think many people are not willing to simply take people's word. I think those in another committee concerned with other legal issues—that solution would be regarded as absurd.

What alternative is there to some kind of tracking system, given that a hypothetical firm has failed to hire enough women or minutes in the past given that it is then under OFCCP, or EEOC, or court instruction to do better in the future? What alternatives are there for watching them for the next 4, 5, or 10 years, other than having a standard which you would like them to meet? And that standard is what we are talking about—a goal or a timetable. Without that standard you cannot know if they are doing well or not.

The **Chairman**. One alternative is to have that pool expand to where business just cannot help but hire the excellent people out in the pool.

I agree with Dr. Bunzel: It is ridiculous to set the standard at the lowest level of the academic department, if you want to have decent schools at all. It seems to me you have got to have the academic departments set the high standards.

Mr. **Osterman**. There are good standards, and there are bad standards. That may have been an absurd standard.

The **Chairman**. That is another question. That also gets into what I am saying. If we have got bad standards——

Mr. **Bunzel**. That one was withdrawn. Let us be clear on that, so there is no doubt. That ultimately was withdrawn, because it was foolish.

To answer part of your question again, Mr. Chairman, it might be useful to remind ourselves now and again—I find myself doing this when I think I have answers to things. One ought to be opposed to what one of my colleagues calls the foregone conclusion. It is not a foregone conclusion that all of the problems—and I do not think the previous witnesses tried to suggest this—are the cause of discrimination, and they certainly did not suggest that there was nothing that we should do except allow businesses to be on their own. I think they understood that there were ways of enforcing the antidiscrimination laws in this country.

In my State and in many other States around the country there has been since the early 1960's, when many of us were walking picket lines to support it, an FEPC law—the Federal Employment Practices Commission. It has not always worked, but it does say that employers and people who are selling and renting homes cannot prohibit somebody from renting or selling to a person because of race or background.

There has been a considerable reduction of precisely that kind of behavior, and I think it is possible—through various ways and others we have not had time to discuss and perhaps even think about—to talk about making it clear that discrimination is not tolerated and that antidiscrimination policing or monitoring can work.

But no landlord is told or has been told yet, "You must rent your next room to a Chicano, a black, or a woman". There is a difference and a theory of limits here.

The **Chairman**. We tried that last fall in the so-called Fair Housing Act Amendments, at least the Congress did. That is what these type of programs inevitably lead to. But I understand what you are saying.

It is hard for me to believe that any university would even suggest what you said—the standard that was withdrawn. If I look back in history at Immanual Kant, who many would say is the quintessential philosopher of all time—who is the basis for our modern philosophy, or at least some say. He was a very obscure, relatively unknown, and not too much followed philosopher-teacher most of his life.

Was it not Kant who wrote "Critique of Reason"? I believe it was. When he wrote that, next to Spinoza's, that was the greatest work ever written in philosophy and probably exceeded Spinoza in many ways. He probably would have been at the bottom of the ladder in that particular department.

We are talking about some very difficult subjective judgments here, and some who do a very good job of speaking and projecting themselves may deserve to be at the bottom of the ladder but seem to be very good. These are just kind of philosophical statements.

Let me do this: You have both piqued my curiosity a great deal. We would like to submit some questions to you and have you answer them for the record, if we can. We appreciate the effort which both of you have put forth in coming here today. Thank you so much.

Mr. **BUNZEL**. Thank you.

Mr. **OSTERMAN**. Thank you.

The **CHAIRMAN**. On our third panel we will have Ms. Day Piercy, executive director of Women Employed, from Chicago, Ill.; and Carmen Estrada from the Mexican American Legal Defense Fund—MALDEF—from San Francisco, Calif.

We are very pleased to have both of you women with us here today, and we will look forward to hearing your testimony. We will start with Ms. Piercy.

STATEMENT OF DAY PIERCY, EXECUTIVE DIRECTOR, WOMEN EMPLOYED, CHICAGO, ILL.

Ms. **PIERCY**. Good morning. Thank you for the opportunity to testify before you to present some views on behalf of Women Employed, a national organization of working women based in Chicago, and the Women's Legal Defense Fund, also a membership organization based here in Washington.

Our organizations have been active in this arena for some 9 years, and through all of our experiences one overriding principle has become clear. From our point of view, enforcement of equal opportunity laws is the foundation for achieving economic equality.

Unquestionably there is a need for many other programs, but simply the fundamental, basic principle must be the enforcement mechanisms and procedures. In fact, over the past 4 years a new framework for enforcing equal opportunity laws has been developed with some positive results.

Progress in eliminating job discrimination has been slow, not because of burdensome Federal requirements or the failure to find real solutions to the problems, but because government enforcement programs have just begun to function.

The facts show, and I know this committee has received many submissions of information about continuing problems of job discrimination. Those are included in my testimony. I will not go into that in this brief overview of the testimony.

In 1973, when Women Employed was formed, we believed that an important strategy for achieving economic equality for working women was voluntary corporate programs. We still believe that. A major stumbling block we have continually encountered has been resistance from employers in establishing those very programs. Time and time again we have identified patterns of job discrimination in individual companies, we have made recommendations for change, only to have our concerns ignored.

Why? Companies have asserted that discrimination does not exist, that there are no problems. We have not chosen to file charges, to seek investigations, to ask for Government intervention; we have been forced to take this action because employers have refused to initiate the very kinds of voluntary programs which would provide equal opportunity.

So we come here today partly to ask the question, What do we say to the women who come to us who have the cases of discrimination? What do we say when women are passed over for promotions, when women do not receive the same pay as men, and what do we say when Federal contractors tell us there are not problems of discrimination, when in fact we have documented those problems?

I would like to point out a prime example of the importance of affirmative action requirements in Women Employed's case against Harris Bank. In January 1981 U.S. Administrative Law Judge Rhea Burrow recommended that Harris Trust & Savings Bank, Chicago's third largest bank pay $12.2 million to some 1,800 women and minority employees who were the victims of discriminatory hiring, pay, and promotion practices. The case dates back to 1974 when Women Employed first filed a complaint with the U.S. Treasury Department, charging that Harris employment practices violated Executive Order 11246, as amended.

Burrows' decision confirms the Department of Labor's 1977 findings. Harris Bank has appealed to Secretary of Labor Raymond Donovan in an attempt to overturn the administrative law judge's decision. In addition, the American Bankers Association has filed an amicus brief asking the Secretary of Labor to delay a decision in the case until the current discussion about regulations has been completed.

From our point of view, the American Bankers Association clearly hopes that deregulation will substantially weaken the enforcement apparatus and remove sanctions.

We clearly have seen many changes in the Office of Federal Contract Compliance in the last 4 years. However, under the Reagan administration right now enforcement efforts have virtually come to a halt. All findings of discrimination must now be sent to the national office for review; no procedures for expediting cases are being used; there is a virtual moratorium on backpay settlements to women and minorities who have suffered losses in pay because of discrimination such as in the *Harris Bank* case.

In addition, Ellen Shong, the current Director of OFCCP, refuses to release to us fiscal year 1981 statistical reports on the Agency's performance. We can only conclude that the OFCCP is abandoning any commitment to enforce Executive Order 11246.

Another major issue is the regulations which define Government contractors' obligations to provide equal opportunity through the establishment of affirmative action plans. In the testimony we are submitting today, we go through the history of this program.

Suffice it to say that the new regulatory proposals that have been issued by the Department of Labor will substantially dismantle the equal opportunity requirements of a Federal contractor.

I would like to submit for the record today a copy of the comments Women Employed and the Women's Legal Defense Fund prepared on behalf of 52 organizations.

The CHAIRMAN. Without objection, it is so ordered.

Ms. PIERCY. To preserve the basic principle of equal opportunity for all citizens, Executive Order 11246, as amended, must be retained. Goals and timetables of affirmative action plans to measure compliance must be retained. Current coverage of contractors must be retained. Continued authorization of debarment sanctions, backpay, and other retrospective relief requirements must be retained. Compliance with outstanding court orders governing OFCCP's enforcement efforts must be carried out.

Last summer Women Employed asked working women what their feelings were on the question of whether employers would do more or less if government programs were reduced and 78 percent of the women responding in our survey felt that their employers would do less to provide equal opportunity if Government enforcement programs were decreased.

I would like to submit for the record a copy of Women Employed's survey, "Working Women Speak Out: A Survey Of Working Women, 1981."

The CHAIRMAN. Without objection, we will put that in the record.

Ms. PIERCY. Thank you.

In closing then, the proposals that we have before us from this administration are not proposals to eliminate paperwork burden, to streamline regulations, to prevent abuse of agency discretion; these indeed are proposals designed to eliminate equal opportunity requirements.

In addition, current budget cuts within the OFCCP will further undermine the Federal contract compliance program. The effect will be to slam the door on opportunity at the very moment in history when women and minorities have at long last begun to pry it open.

This Nation's commitment to economic equality is given meaning by Executive Order 11246, as amended, and the enforcement apparatus of the OFCCP. The continued existence of those regulations, combined with vigorous enforcement efforts, is critically needed now to maintain that commitment.

I would be glad to answer any questions that you might have, Senator.

[The prepared statement of Ms. Piercy and information referred to follows:]

TESTIMONY ON
SOLUTIONS TO JOB DISCRIMINATION

BEFORE THE SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES

Submitted on behalf of: Women Employed
Women's Legal Defense Fund

We appreciate the opportunity to testify before you on solutions to job discrimination in our society. Women Employed is a national organization of working women which was founded in 1973. Our 3,000 members work at all levels of employment in insurance companies, banks, law offices, for the government, and in all types of corporations. Women Employed has a two-fold purpose: 1) dealing with employers' discriminatory practices through direct negotiation, training, education, and, where necessary, by filing charges with government agencies and in the courts; and 2) monitoring government enforcement activities. The Women's Legal Defense Fund, also a membership organization with 1,000 members, most of whom are women attorneys, engages in pro bono litigation, administrative advocacy, and public education aimed at eradicating sex discrimination in employment. Women Employed and the Women's Legal Defense Fund cooperate in a joint project to monitor enforcement of equal opportunity laws.

Our organizations have scored major gains in the affirmative action arena. We have exposed the discriminatory practices of numerous employers and compelled government officials to enforce the law. As a result, thousands of women have received higher wages, better benefits, promotions, and equal pay for equal work.

Throughout all of our experiences, one overriding principle has become clear. Enforcement of equal opportunity laws is the foundation for achieving economic equality for all in the job market. Unquestionably, there is also a need for training programs, career development strategies, education programs and a wide array of innovative approaches to enhance opportunities for all employees to fully use their skills and abilities in the job market. However, these programs can only have real meaning if they are linked to vigilant enforcement.

In fact, over the past four years, a new framework for enforcing equal opportunity laws has been developed with major positive results. Progress in eliminating job discrimination has been slow not because of burdensome federal requirements or the failure to find "real" solutions to the problems, but because government enforcement programs have just begun to function.

The facts show that we are a long way from the goal of providing all employees with equal opportunity in hiring, job placement, training, promotion, and pay. In spite of the major gains which have been made, women currently earn 59¢ for every $1.00 men make. In 1955, women made 64¢ for every $1.00 men made. In every major occupational group, the earnings of fully employed women lag significantly behind those of men in the same occupations. Women sales workers make on the average 52¢ for every $1.00 men sales workers make. Women managers and administrators make an average of 58¢ for every $1.00 earned by men in these jobs. Even in clerical jobs, women clericals make an average of 65¢ for every $1.00 earned by male clericals. For minority women, the economic consequences of the burden of double discrimination are even worse. Black women who work full time earn only 75¢ for every $1.00 black men earn and 54¢ for every $1.00 white men earn.

Historically, women and men worked side by side doing the same work, holding the same job title, but the men earned higher salaries. This custom was justified by now repudiated beliefs about the innate inequality of men and women and by the always inaccurate notion that women's earnings were not necessary for their support or the support of their families. Today, blatant wage discrimination still exists, despite its illegality. But, in many instances, the "custom" of paying women less than men is maintained through intricate job classification systems that create diverse job titles to mask work that is virtually the same. Often women are placed in lower job codes than men even though their work is comparable to that of male co-workers in higher job codes. For example, women may hold the title of "assistant manager" while men are higher paid "managers"; yet their actual experience, skill and job content are comparable.

Traditionally, women have been placed in dead-end jobs with no career paths for advancement; they often face a "catch-22" situation. In order to qualify for more responsible jobs, certain training and certain job experience are necessary, but women are denied access to jobs which would qualify them for higher paying positions. And then employers assert that no "qualified" women can be found to fill job openings.

In recent years, some women have gained access to jobs with possibilities for promotion. However, these jobs are often limited to certain classifications or departments where career paths and future earning power are severely limited. For example, most insurance women are usually found in the less lucrative personal lines rather than commercial lines. Women work in "inside" sales jobs where opportunities for advancement are limited, while men are placed in "outside" sales positions which are higher paying and are the route to higher level positions. Women are concentrated in staff, personnel, or administrative departments where salaries are lower and opportunities limited. In retail sales, women are assigned to sell low-priced items while men are placed in the "big ticket" higher commission departments.

Even as a few women have finally succeeded in breaking the barriers and entering job classifications traditionally held by men, women remain clustered in the lowest-paid positions in these classifications. Their progression up the career ladder is slower than for their male counterparts; women predominate in the lowest salary grades for officers.

When women are initially placed in dead-end jobs, their opportunities for advancement are obviously limited. When certain jobs are viewed as "women's jobs" and others are viewed as "men's jobs," mobility for women is reduced and economic achievement is limited. When women are promoted more slowly than men even when their qualifications, skills and experience are comparable, women never achieve salaries commensurate with male co-workers in similar jobs. The continuing pervasiveness of sex discrimination raises the critical question regarding strategies for achieving equal opportunity for women in this country.

In 1973, when Women Employed was formed, we believed that an important strategy for achieving equality for working women was voluntary corporate programs. We still believe that. The major stumbling block we have continually encountered, however, has been resistence from employers in establishing these programs. Time and time again, we have identified patterns of job discrimination in individual companies. We have made recommendations for change only to have our concerns ignored. Why? Companies have asserted that discrimination does not exist, that there are no problems. We have not chosen to file charges, to seek investigations, to ask for government intervention. We have been forced to take this action because employers have refused to initiate the very kinds of voluntary programs which would provide equal opportunity.

Thus, the issue of government regulations for us is not an abstract question of government policy but rather a very real day-to-day issue affecting the future of millions of working women in the job market.

What do we say to the women who call us and tell us that their company treats male and female underwriters differently? Men are given promotions while women are not considered for higher paying jobs. Men have career paths but women are placed in dead end jobs. They have talked to personnel officials but no action has been taken.

What do we say to the women who inform us that the bank they work for places women in lower paying jobs, promotes few women to officer positions, and even when women receive those promotions it takes them two to three years longer to become officers than comparably qualified males?

What do we say to the woman engineer who calls us because her employer provides different job assignments for male and female engineers, which means that female engineers do not receive the kind of experience which would qualify them for higher paying positions?

What do we say to the woman truck driver who calls us because she just had an interview at a trucking firm and was told, "We don't hire women because it would create problems for women and men to drive together on long, overnight trips?"

When "voluntary" equal opportunity policies do not exist and employers refuse to respond to the problems of discrimination, where do women turn? Do we just tell them there is nothing that can be done unless they can raise the money to take their case to court? Litigation is not an alternative for most working women on their limited salaries.

Does the government have a responsibility to act? If we believe that women and minorities have a right to equal opportunity, and we do, then the answer must be that the government indeed has a responsibility to enforce equal opportunity laws, to assist women and minorities who are the victims of discrimination.

One of the government agencies which currently has that responsibility is the Department of Labor's Office of Federal Contract Compliance Programs. This agency has responsibility for enforcing Executive Order 11246, as amended, which was issued in 1965 by President Lyndon Johnson. Under the Executive Order, companies that receive federal contracts are required to have programs and take affirmative action to ensure equal opportunity for women and minorities i[illegible]g, job placement, training and promotions.

Federal contractors are sub[illegible] to review by the OFCCP and when discriminatory practices are found, they are required to remedy them. Companies which refuse to provide equal opportunity face loss of federal contracts and may be prevented from receiving future contracts.

In recent years, the federal contract compliance program has undergone major changes. On October 1, 1978, the entire contract compliance program was consolidated into the Department of Labor's Office of Contract Compliance Program. Before reorganization, the OFCCP had overall responsibility for reviewing federal contractors and enforcing Executive Order 11246, as amended; but eleven different compliance programs within the contracting agencies (e.g., Treasury, HEW, Defense, etc.) had the actual responsibility for monitoring industries. The federal contract compliance effort was a bureaucratic maze, with different handbooks, procedures, rules and guidelines in each agency, and a poor record of enforcing the Executive Order.

Although massive reorganization was a crucial step toward revitalizating the OFCCP, the agency did not adequately guard against bureaucractic and structural changes which unnecessarily impinge on enforcement activity. While agency officials became totally absorbed in staff training and standardization of procedures, enforcement strategies were ignored. In mid-1979, Women Employed and the Women's Legal Defense Fund formally proposed that OFCCP establish some type of experimental unit(s) which could be structured to utilize expert managers and investigators to test the procedures and standards which were intended to be operational agency-wide only after a number of years. We also called for the establishment of a strike force approach utilizing OFCCP investigatory staff as well as legal support from the office of the Solicitor of Labor (SOL) in order to concentrate on key enforcement targets. OFCCP delayed the implementation of this recommendation for ten months. In April of 1980, at a joint conference between staff from the OFCCP and the SOL, a strike force approach to enforcement was adopted. Each of the ten OFCCP regions was to work with the SOL legal staff on at least two major enforcement cases to be put on a "fast tract" for concilation or litigation. On a continuing basis, legal experts and investigators were to team up on development of cases to be reviewed by a joint OFCCP-SOL committee.

By the end of 1980, the agency had developed an enforcement apparatus with the potential for investigating and dealing with problems of discrimination. In FY 1980, over 4,000 persons were awarded nearly $9.3 million in back pay through increased conciliation agreements and use of sanctions. This was more than the total back pay awarded in the two years preceding consolidation. Since 1965, 27 federal contractors have been debarred from doing business with the government. Over half of those debarments occurred in the last three years of the Carter Administration.

Of particular importance is the investigation of affected classes of women and minorities who suffer from the effects of past discriminatory treatment. Essentially, affected class analysis is the key to attacking systemic discrimination by federal contractors. In FY 1980, 391 affected class cases were being handled, almost all of which were initiated after consolidation.

Under the Reagan administration, enforcement efforts have virtually come to a halt. All findings of discrimination must now be sent to the national office for review. No procedures for expediting cases are being used. There is a virtual moratorium on back pay settlements to women and minorities who have suffered losses in pay because of discrimination. In addition, Ellen Shong, the current Director of the OFCCP refuses to release to us FY 1981 statistical reports on the agency's performance. We can only conclude that the OFCCP is abandoning any commitment to enforce Executive Order 11246.

Another major issue is the regulations which define government contractors' obligations to provide equal opportunity through the establishment of affirmative action plans.

Four years ago, after years of criticism from client groups, contractors, and Congressional committees, OFCCP pledged to undertake vital regulatory reform in order to standardize, streamline and strengthen the Executive Order program. In December, 1979, the OFCCP proposed extensive revisions of the regulations which govern the enforcement of Executive Order 11246, as amended. This long awaited initiative came after an extended process of consultation with representatives of protected classes, federal agencies with EEO responsibility, and contractors; and clearly represented the most important contribution to policy development in the agency. Women Employed and the Women's Legal Defense Fund strongly supported the majority of the proposed changes.

Present procedures are confusing and are not tailored to meet the investigatory and adjudicatory needs of the contract compliance program. Courts have held in some circumstances that the procedures fail to provide due process. Most importantly, the existing enforcement process takes too long to identify and remedy discriminatory practices, and is easily manipulated by recalcitrant contractors to create further delay. The proposed final revisions addressed these problems.

Moreover, these final regulations reflected the process the OFCCP undertook to develop them. The extensive consultation process served a vital role in refining the proposals and ensuring that the perspective of all those affected was included. These were not midnight regulations as some have charged.

However, the Reagan administration suspended the effective date of the final regulations, which had been issued in accordance with the Administrative Procedures Act, and simply returned to the previous regulations without any public notice or comment period. Now, new regulations have been proposed which will:

1. Require written affirmative action programs only of contractors having 250 or more employees and a contract of $1 million. This change will exempt 75% of all federal contractors.

2. Exempt contractors from compliance reviews for five years after a review is completed.

3. Require all third-party class charges, by organizations like Women Employed to include names of individual employees who have complained of discrimination. This requirement, if implemented, will effectively silence women and minorities who are suffering discrimination on the job but who fear harassment or reprisal if they exercise their right to bring a complaint.

4. Eliminate all reviews of contractors prior to awarding contracts.

Even more disastrous regulations are planned. Discussions are underway to eliminate back pay requirements and requirements for goals and timetables to remedy discriminatory patterns and practices.

These proposed new regulations are a systematic effort to dismantle the entire enforcement apparatus under Executive Order 11246, as amended. The Executive Order program is premised on the government's constitutional obligation to ensure that federal monies are not used to discriminate. Any effective enforcement of this obligation cannot rely on voluntarism only. There must be measurable standards to evaluate the "good faith" of contractors' efforts, and meaningful sanctions for non-compliance. Further, an effective enforcement framework is necessary regardless of the resource levels allocated. While the OFCCP is not able to review the compliance of all contractors and subcontractors, those that cannot be reviewed should not be freed of their contractual obligations. No one would suggest that crimes should only be illegal for those who are caught.

Another element necessary to effective Executive Order enforcement is the authority of the Department of Labor to require compliance. The threat of debarment and the requirement that contractors remedy discrimination before being deemed to be in compliance have proven to be by far the most effective means at the OFCCP's disposal to achieve the goals of the program. Neither of these tools should be removed if the Executive Order is to continue to have a meaningful effect on contractors' employment policies.

A final factor that must be incorporated into the OFCCP enforcement program is compliance with the Department's court-imposed obligations. A number of challenges to past lax or non-existent OFCCP enforcement nave been sustained or settled; the resulting court orders binding the OFCCP cannot be ignored.

To preserve the basic principle of equal opportunity for all citizens, Executive Order 11246, as amended, must be retained. Goals and timetables in affirmative action plans to measure compliance must be retained. Current coverage of contractors must be retained. Continued authorization of the debarment sanctions, back pay, and other retrospective relief requirements must be retained. Compliance with outstanding court orders governing OFCCP's enforcement efforts must be carried out.

The current controversy over affirmative action requirements is based in large measure on the charge that the OFCCP has become confrontational, adopting an adversarial posture toward contractors. We object strenuously to framing the issue in this manner. Unquestionably, when government enforcement officials document discrimination but employers assert no discrimination exists, an adversarial relationship results. From the standpoint of women and minorities who are the victims of that discrimination, the government is properly executing its responsibility to uphold equal opportunity laws.

In fact, because of Executive Order 11246, as amended, women have achieved the right to work in coal mines, in construction jobs, in professional and executive positions, in higher paying positions in educational institutions. Because of the Executive Order, major changes have occurred in the coal industry. In 1973, .0001% of the employees working underground in the mines were women. In 1975, that percentage had increased to 1%; and by 1979, 11.4% of the employees working underground in the mines were women. Enforcement of Executive Order 11246, as amended, played a major role in this improvement.

Because of the Executive Order, major changes have occurred in the banking industry. Banks have begun, although slowly and with considerable resistance, to change their hiring and promotion practices. In 1960, 12.2% of bank officials/financial managers were women--only one-half percent more than there were ten years earlier in 1950. By 1970, the percentage had increased to 17.6%; by 1979, it had nearly doubled to 31.6%. Enforcement of Executive Order 11246 played a major role in this improvement.

Thus we have concrete evidence of the progress which can be made when government enforcement mechanisms exist and are used to deal with problems of job discrimination. We also have concrete evidence of the failure of government programs relying solely on voluntary mechanisms. Prior to establishment of the present federal contract compliance program with Executive Order 11246 in 1964, a number of Executive Orders, going back as far as 1941, were issued to encourage federal contactors to hire more minorities through voluntary "Plans for Progress." But after a number of years of such "Plans for Progress," it became clear that voluntary compliance, without sanctions for non-compliance, was an absymal failure. Virtually no real change had been made in the hiring practices of federal contractors. This failure provided the backdrop for a natural evolution to the present system in which sanctions are available for those contractors that fail, after repeated efforts at conciliation, to take steps to comply with their contractual obligations to provide equal opportunity.

Current OFCCP Director Ellen Shong calls her program "Partnerships and Progress." The partnership is between the government and employers. There will be no progress. Without enforcement mechanisms, women and minorities will be denied the means for resolving discrimination problems which arise because employers refuse to implement equal opportunity policies voluntarily.

A prime example of the importance of affirmative action requirements is Women Employed's case against Harris Bank. In January, 1981, U.S. Administrative Law Judge Rhea M. Burrow recommended that Harris Trust and Savings Bank, Chicago's third largest bank, pay $12,167,515 to some 1800 women and minority employees who are the victims of discriminatory hiring, pay, and promotion practices. The case dates back to 1974 when Women Employed first filed a complaint with the U.S. Treasury Department, charging that Harris' employment practices violated Executive Order 11246, as amended, which requires affirmative action by firms doing business with the federal government. The U.S. Department of Labor entered the case in 1975, and in 1977 found Harris guilty of violating the Executive Order.

Burrow's decision confirms the Department of Labor's 1977 findings. Relying both on statistical data provided during the trial by the government and on the testimony of employee witnesses provided by Women Employed, Burrow said that Harris had "failed to rebut substantial evidence provided by the government showing the continuing effects of discrimination." Harris Bank violated Executive Order 11246, as amended, Burrow found, "by engaging in various discriminatory practices well after the Executive Order was enacted."

Women Employed's case against Harris Bank has been watched closely because it is the first in which the federal government has sought to withdraw deposits from a bank because of discrimination, and the first time the government has sought back wages for an "affected class" of bank employees through administrative sanctions.

Women Employed became involved in 1974 when women employees at Harris contacted the organization with their complaints of discriminatory hiring, placement, training, salary, and promotion policies. Women and minorities found themselves in dead-end jobs, while similarly qualified white males hired at the same time advanced in their careers. Women with college degrees, for example, were hired for clerical positions, while white male college graduates were offered training and jobs in promotional lines. Even when the bank opened up training programs to women, the training and placements provided were inferior, so the women did not become "qualified" for better jobs.

Looking at this evidence, Women Employed reached two conclusions: the bank's required affirmative action program was inadequate, and there were many women and minorities who deserved back wages, training and promotions because they had been denied advancement opportunities. Providing back pay for this "affected class" of Harris employees was a crucial part of the case, because no future affirmative action plan would compensate them for past discrimination and loss of salary.

Harris Bank has appealed to Secretary of Labor Raymond Donovan in an attempt to overturn the Administrative Law Judge's decision. In addition, the American Bankers Association has filed an amicus brief asking the Secretary of Labor to delay a decision in the case until the current discussions about regulations under Executive Order 11246, as amended, have been completed. Obviously, the ABA hopes that de-regulation will substantially weaken the enforcement apparatus and remove sanctions.

The Harris Bank case graphically demonstrates the serious economic effects of discrimination and the need for government efforts to ensure equal opportunity for all in the job market. Without enforcement of government regulations requiring equal opportunity in hiring, training and promotions, women and minorities will continue to suffer discrimination.

Because enforcement of the Executive Order has resulted in sanctions including back pay awards and debarments, employers have begun to complain loudly and angrily that the affirmative action requirements are burdensome and counterproductive. In fact, these complaints have risen dramatically in direct response to the increased enforcement activities over the past four years.

Working women, however, have a very different perspective. Last summer, Women Employed conducted a survey of working women in Chicago. We asked women about their employment experiences. Over 1800 women responded to this survey. Two-thirds of the respondents reported that they had experienced discrimination in hiring, training, promotion, job placement, or pay, or that they had encountered sexual harassment. We also asked women how they felt their employers would respond if existing federal equal opportunity enforcement efforts were reduced. Seventy-eight percent responded that they felt their employers would do less to provide equal opportunity if government enforcement programs were decreased.

Current proposals to reduce the number of federal contractors who must comply with equal opportunity requirements, eliminate back pay awards, and eliminate specific programs with goals and timetables for achieving equal opportunity will bring to a halt the progress toward equality which has just begun. These are not proposals to eliminate "paperwork burdens," to "streamline regulations," to "prevent abuse of agency discretion." These are proposals designed to eliminate equal opportunity requirements. In addition, current budget cuts within the OFCCP will further undermine the federal contract compliance program. The effect will be to slam the door on opportunity at the very moment in history when women and minorities at long last have pried it open.

Today, 8.5 million women work to maintain their families. Among these are 2 million women whose husbands are "absent", 2.3 million women who are widowed and 4 million women who are divorced. In addition, 11 million single American women are working to maintain themselves. Almost 13 million married women with children are working. Forty percent of black households are female-headed, dependent solely or primarily on the woman's livelihood.

All of these women's earnings are crucial to the well-being and economic stability of their families. These women need and are entitled to equal opportunity. Women have a right to expect that employers who do business with the federal government will be required to provide equal opportunity for all employees. Unfortunately, the reality is that many employers will not practice equal opportunity voluntarily. The continuing pervasiveness of discrimination is a testament to that fact. This nation's commitment to economic equality is given meaning by Executive Order 11246, as amended, and the enforcement apparatus of the OFCCP. The continued existence of those regulations combined with vigorous enforcement efforts are critically needed now to maintain that commitment.

Comments on the OFCCP's Proposed Rule Regarding Affirmative Action Requirements for Government Contractors (published at 46 F.R. 42968, August 25, 1981)

October 26, 1981

Submitted by Women Employed and the Women's Legal Defense Fund on behalf of:

Affirmative Action Coordinating Center
American Association of University Women
American Federation of Government Employees
American Sociological Association
Americans for Democratic Action
Center for Community Change
Center for National Policy Review
Coal Employment Project
Coalition of Labor Union Women
Committee for Women in Non-Traditional Jobs
Comparable Worth Project
Corporate Responsibility Committee, Sisters of Charity, BVM
Eight Day Center for Justice
Employment Law Center, Legal Aid Society, San Francisco
Equal Rights Advocates
Federally Employed Women
Hard-Hatted Women
International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC
League of Women Voters of the United States
Legal Aid Society of Alameda County
Michigan Democratic Women's Caucus
NAACP Legal Defense and Educational Fund, Inc.
National Coalition Against Domestic Violence
National Commission on Working Women
National Committee on Household Employment
National Conference of Black Lawyers
National Congress of Neighborhood Women
National Council of Jewish Women
National Employment Law Project
National Federation of Business and Professional Women's Clubs, Inc.
National Organization for Women - NYC Chapter
NOW Legal Defense and Education Fund
National Women's Political Caucus
Non-Traditional Job Opportunities
Organization of Pan Asian American Women, Inc.
Permanent Commission on the Status of Women of Connecticut
Puerto Rican Legal Defense and Education Fund
Reproductive Rights National Network
Service Employees International Union
Sisters of Loretto
Tradeswomen Inc.
United Auto Workers
United Mine Workers
Women for Blue Collar Jobs
Women for Racial and Economic Equality
Women in Skilled Employment
Women USA
Women's Rights Clinic, Antioch School of Law
Working Women
Working Women's Institute
Congresswoman Patricia Schroeder
Wider Opportunities for Women

COMMENTS
on
the OFCCP's Proposed Rule Regarding Affirmative Action Requirements for Government Contractors

October 26, 1981

Introduction

These comments are submitted in response to the OFCCP's August 25, 1981, proposal to amend substantially its regulations governing affirmative action requirements for federal contractors under Executive Order 11246, as amended, section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and section 503 of the Rehabilitation Act of 1973, as amended. (46 F.R. 42968; corrected September 22, 1981, at 46 F.R. 46815). Women Employed, Women's Legal Defense Fund, and the other signatories to these comments represent a constituency that the contract compliance program is designed to serve. These organizations are committed to a federal contract compliance program that requires that contractors agree to nondiscrimination and affirmative action as a condition of doing business with the Government. We firmly believe that such a program is an essential tool in the national effort to provide true equal employment opportunity for members of groups to whom it has been denied in the past because of their race, national origin, religion, or sex. Indeed, the Executive Order program is premised on the Government's constitutional obligation to ensure that federal monies are not used to discriminate. We are united in opposing any weakening in the enforcement of this obligation.

Thus we completely oppose the present proposal, which severely weakens and undermines strong federal contract compliance enforcement. The proposed regulations would substitute for a set of revised OFCCP regulations that had previously been finalized, and were scheduled to become effective on January 29, 1981. 45 F.R. 86206 (December 30, 1980) (hereafter, "the December 30, 1980 regulations). That revision, itself the product of years of study and consultation, would have in most respects continued a steady tradition of continuous strengthening of the federal contract compliance enforcement program. Yet the Department of Labor has repeatedly delayed the effective date of those regulations, and has now published the present proposals instead.

Similarly, since the beginning of the new administration, the Department of Labor has signalled by its actions and the pronouncements of its officials, as well as by its published regulations, its intent to retreat from strong federal contract compliance enforcement. The withdrawal of the regulation prohibiting contractors' payment of employee dues to segregated clubs,[1/] the publication of an Advance Notice of Proposed Rulemaking that questions one of the most basic tenets of equal employment opportunity enforcement (i.e., whether the OFCCP should continue to utilize back pay to resolve deficiencies),[2/]

[1/] 46 F.R. 19004 (March 27, 1981).

[2/] 46 F.R. 36213, 36215 (July 14, 1981).

the repeated, inflammatory charges that the program is "too adversarial,"[3] the renewed review and delay of a number of pending OFCCP conciliations that would provide strong relief to victims of discrimination,[4] the public admission by the OFCCP Director that back pay remedies would not be utilized pending review of the issue[5] -- all are unmistakable signs that federal contractors need no longer be concerned about enforcement of their EEO and affirmative action obligations. It is nothing less than shocking that this Administration would reverse a 40-year trend of increasing effectiveness of the federal contract compliance program, to further the constitutional goal of equal employment opportunity.

Nor can these proposals be justified by the need for "reduction of the compliance burdens" on America's businesses. To the contrary, such "buzz" words and phrases as "paperwork burdens," "over-regulation," and "abuse of discretion," though they may be valid in some contexts, are here being used in bad faith, to cloak opposition to equal employment opportunity for women and minorities. Indeed the whole thrust of these proposals is to alleviate the complaints of contractors. Victims of discrimination are being largely ignored. We know that the contractors' complaints are a result of the fact that the Executive Order program that the Reagan administration inherited had finally put strong enforcement mechanisms in place. Proposed changes to the program are in direct response to such complaints.

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[3] E.g., see the Statement of Malcolm Lovell, Under Secretary of the U.S. Department of Labor, before the Subcommittee on Employment Opportunities, House Committee on Education and Labor (October 7, 1981) at 2 (characterizing the OFCCP as "run in a highly adversarial manner "which principally produce(s) paperwork, aggravation and contempt for the entire affirmative action concept....").

[4] See "OFCCP Chief Slows 'Significant' Cases," Legal Times June 22, 1981.

[5] See Women Employed News, Fall 1981, No. 3, p.1.

Such complaints are not due to duplicative, inconsistent, or burdensome requirements, as those who are most vocal in the attack claim, but rather to the program's newly-achieved potential for effectiveness. The effect will be to slam the door on equal employment opportunity at the very moment in history when women and minorities at long last have pried it open.

Highlights: the Crucial Issues

In this submission we comment extensively on many of the proposed revisions. However, certain of the proposals are particularly inimical to the goal of strong and effective federal contract compliance. We highlight these proposed changes here:

- -- Drastic reduction in number of contractors required to prepare written affirmative action plans (AAP's), by raising the threshold amounts and eliminating aggregation;
- -- Complete elimination of preaward reviews under any circumstances;
- -- Adoption of weaker standards for sex discrimination in the areas of sexual harassment and pregnancy discrimination, inconsistent with existing EEOC regulations and court precedent;
- -- Addition of requirement that third-party complainants identify alleged discriminatees to the extent known;
- -- Allowance of finding of compliance even where there are unresolved complaints of discrimination;
- -- Establishment of a five-year exemption from AAP requirements; and
- -- Elimination of the requirement of annual AAP summaries.

Each of these aspects of the proposal would, if implemented alone, weaken the effectiveness of the contract compliance program. Taken together, they would have a devastating impact on the program's scope and significance, because they are tantamount to eliminating federal contractors' obligation to comply with the Executive Order -- i.e., to identify underutilization, to set goals and timetables and to correct any existing discrimination. They thus reverse federal contract compliance policy -- but in the guise of merely "streamlining" it. We deplore both the effect and the means of this effort.

Preliminary Regulatory Impact Analysis

In the Preamble and in the full Preliminary Impact Analysis, the Department of Labor claims that the proposed changes reduce the cost of complying for contractors "without significantly affecting" employee protections under Executive Order 11246, as amended. As discussed throughout this submission, we believe that several aspects of the present federal contract compliance program that the proposal would change are not only required by the Executive Order itself, but are of constitutional dimension; thus, these aspects[6/] cannot be eliminated regardless of their relative cost or benefit. From this perspective the weighing of cost to contractors against benefit to the public is irrelevant.

However, even within the framework of evaluation of costs and benefits, the Department of Labor's impact analysis is patently inadequate. Throughout, it merely asserts that the proposed changes will not reduce "regulatory benefits" without attempting to measure that concept. It completely fails to recognize, much less to attempt to quantify, the potential social and economic costs of reduced EEO enforcement. For example, nowhere does it address any of the following: immediate costs to the victims of discrimination in terms of

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[6/] They stem from the requirement to eliminate federally-subsidized discrimination and include the requirement of meaningful AAP's, the authority to conduct preaward reviews, and the authority to require retrospective relief as a condition of a contractor's being found in compliance.

unemployment or segregation into low-paying jobs; the tax consequences of this situation; the potential rise in AFDC, food stamp, and Medicaid costs; the long-range social and economic costs of having disproportionately high unemployment rates for women and minorities; the costs of defending more private lawsuits to both the government and private contractors; the social and economic costs of a disillusioned and bitter segment of the workforce; the potential loss of jobs for employees presently engaged in affirmative action compliance; the costs of conducting compliance reviews without adequate data; etc. It does not even attempt to assess the likelihood of any of these consequences. Rather, the Regulatory Impact Analysis focuses solely on one cost factor involved in contract compliance enforcement: the paperwork costs to companies. As such, it reveals the Department's bias in publishing these proposals. No such document can be relied upon for policy-making.

Back Pay

Finally, we reiterate our strong opposition to any proposals to reduce in any way the general authority of the OFCCP to require back pay and other retroactive relief as a condition of a declaration of compliance. While such proposals were not included in the notice published on August 25, 1981, the requirement of back pay is so integral to the effectiveness of the OFCCP enforcement program that we cannot comment on any revisions to the regulatory scheme without adverting to it. Maintenance of this back pay authority is required by legal, practical, and equitable considerations.

First, back pay and other forms of restitution are clearly authorized -- indeed, required -- by the Executive Order itself, which both permits the OFCCP to condition "continuance of contracts... upon a program for future compliance [with the nondiscrimination provisions of the contract]" (Section 209(a) (5)), and requires a contractor to establish and implement policies to comply with its nondiscrimination obligation (Section 209(a) (6)). Furthermore, the Executive Order authorizes the Secretary of Labor to promulgate regulations imposing sanctions and invoking remedies as necessary and effective (Section 202(6)). Nor is there any doubt that this authority is well within the permissible scope of the Presidential authority. United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976).

As a practical matter, the authority to require a back pay remedy is the most effective incentive to contractor compliance. As the Supreme Court explained in Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975):

> It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers...to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." [Citation ommitted.]

While debarment is also available as an incentive to compliance, it is so severe a sanction that it is only rarely employed. Back pay is much better tailored to serve as a reasonable, yet effective, deterrent.

Moreover, exercise of the back pay authority by the OFCCP reduces unnecessary duplication with the EEOC's efforts in enforcing Title VII of the Civil Rights Act of 1964. If the OFCCP did not have the authority to require remedies for specific instances of discrimination, the EEOC would be required to go back to the same company to gather the same data, when it investigated allegations of discrimination against that company. Furthermore, because the EEOC so rarely acts absent an individual's charge of discrimination, relying on the Title VII process alone to ensure that victims of discrimination are recompensed means that in almost every instance, at least one individual named complainant will have to risk retaliation by filing a charge and then muster the not inconsiderable resources necessary to pursue that charge.

Finally, for the OFCCP to ignore questions of relief when investigating contractors' EEO practices would be simply unjust to the victims of discrimination. Not only will particular unlawful practices go unredressed, and particular grievants with valid claims be denied relief, but also public confidence in the government's commitment to EEO will inevitably deteriorate. Promises not to discriminate in the future -- even to institute concrete programs to ensure that there will be no discrimination in the future -- do little to relieve the consequences of whole careers' worth of discrimination for those who have already suffered it.

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We now turn to comments on the specific proposals. Throughout these comments, we follow the convention of referring to federal contractors, subcontractors, and federally assisted construction contractors collectively as "contractors," unless otherwise noted. Section numbers references are to sections in the proposed rules, unless otherwise noted.

Elimination of Principle of Aggregation

The proposed rules would eliminate the concept of aggregating or accumulating threshold contract amounts for determining which contractors would be subject to three crucial requirements:

(1) coverage of the Executive Order itself (§60-1.5(a));

(2) filing of EEO-1 forms (§60-1.7(a)); and

(3) preparation of written affirmative action plans ("AAP's") (§60-1.40).

We strongly oppose this change, especially in light of other proposed threshold increases which would further reduce the universe of contractors subject to each of these requirements. The combined effect of the elimination of aggregation and the thresholds changes will be that a contractor with hundreds of thousands of dollars in contracts but no single contract of $10,000 or more, would be completely exempt from the Executive Order's strictures; a contractor with 100 employees and half a million dollars in federal grants, none of which is for more than $50,000, would not be required even to file an EEO-1 form to give the OFCCP even the most gross data about its employment profile; and a contractor with thousands of employees and a dozen federal contracts of $999,999 each would not be required to prepare an AAP at all.

This is an enormous and significant loophole which will have the effect of wholesale exemption of thousands of large and important contractors. For example, the Women's Equity Action League (WEAL) has found many examples of universities that receive a number of contracts totaling over $1 million, but may lack any single contract for $1 million or more which would require them to have written plans. Among those universities which received an aggregate of $1 million or more in new federal contracts in 1980, but no single contract of more than $1 million, are Yale University (receiving over $4 million), University of Michigan (receiving over $7 million), George Washington University (receiving over $3 million), and the University of Southern California (receiving over $5 million). Yet under the proposed changes, none of these universities would be required to prepare an AAP. In effect, they would be exempt from any affirmative action obligation whatsoever.

By no stretch of the imagination are such contractors "small" business for whom Executive Order compliance is particularly burdensome. In light of the proposals to raise the thresholds themselves, eliminating aggregation has a "double whammy" effect for which there is no justification.

Federal Deposit Insurance as a Basic for Coverage

We support the proposed clarification of the regulations to conform to the Department's long-held position that federal deposit or share insurance is a federal contract for purposes of Executive Order coverage (§60-1.5(a)).

However, the force of this clarification is undermined by addition of a proposed new provision that would limit the enforcement mechanisms that the OFCCP could bring to bear on non-complying financial institutions with FDIC (and no independent basis for jurisdiction) -- §60-1.68 (g-i). Under these provisions, the Department of Labor would be prohibited from debarring banks and other financial institutions from future federal deposit insurance contracts, regardless of the nature or intent of the violation, the status of the institution, or any other circumstances.

This is an untenable abdication of the OFCCP's enforcement authority. The choice of sanction to pursue should be made as a matter of discretionary policy, on a case-by-case basis, not as a wholesale renouncement of a kind of sanction for an entire class of contractors. By putting this provision in the regulations themselves, the OFCCP locks itself into this enforcement policy for all cases in the future.

The result is that banks and other financial institutions, unlike all other contractors, can rest free of concern that the contracts they rely on most heavily could be jeopardized by their unlawful employment practices. This relieves the banking institutions of one of the strongest incentives to comply. Nor is there any justification for singling out financial institutions for such treatment;[7] to the contrary, rampant discrimination has been documented in the banking industry.

Finally, referrals to the Justice Department, EEOC, or the banking regulatory agencies -- the alternatives provided in the proposed regulation -- are inadequate. The banking regulatory agencies in particular have neither the expertise, the commitment, nor the self-interest, to enforce EEO.

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[7] The OFCCP does not contend that federal deposit insurance is not a contract.

Exemption of State and Local Government Instrumentalities from the Requirements of AAP's and Annual Compliance Reports (§60-1.5(a)(4))

Under both the current and the proposed regulations, state and local government agencies or instrumentalities that are federal contractors, except for educational institutions and medical facilities, are exempt from filing annual compliance reports and from maintaining written AAP's. The December 30, 1980 regulations would have included public utilities among those state or local government entities that would be subject to these requirements -- an inclusion we supported wholeheartedly.

We oppose the continuation of this exemption for state and local government entities, and especially for public utilities. Public employers are major sources of employment opportunities, but at the same time are often bastions of entrenched race and sex discrimination, maintained by state veterans' preferences that favor white males. Public utilities, in particular, are often large contractors, relatively independent from governmental control. Creation and implementation of an AAP (and the ancillary compliance reporting) for such employers serves an important public interest. Moreover, many state and local governments are required by state law to prepare affirmative action plans; for them, elimination of this exemption would pose no additional regulatory requirements.

Increase of Thresholds for Contractors Required to Submit EEO-1 Forms (§60-1.7(a))

The proposed regulation would raise the minimum threshold for the requirement of filing EEO-1 forms to those contractors with 100 employees (and $50,000 in contracts, unaggregated).[8/] We oppose this change. The submission of an EEO-1 form imposes a minimal recordkeeping and reporting burden, since the information required is so general that most companies keep such statistics as a matter of routine. On the other hand, the form is an important tool for OFCCP enforcement, because it provides at least a gross measure by which the OFCCP can make initial evaluations of contractors' performance.

Increase in Threshold for (Non-construction) Contractors Required to Prepare Written Affirmative Action Plans (§60-1.40(a))

The Department of Labor proposes to raise the threshold levels (in number of employees and dollar amount) above which contractors are required to prepare and implement written affirmative action plans ("AAP's"). The present regulations impose this requirement on contractors who have 50 or more employees and a contract of $50,000 or more, 41 C.F.R. 60-1.40; the Department would raise the levels to 250 employees and $1,000,000 in contracts.

We oppose any reduction in the universe of contractors subject to the AAP requirement. This requirement provides perhaps the most important tool for ensuring equal employment opportunity in the entire arsenal of enforcement mechanisms. Only when employers undertake self-analysis of their workforces and develop steps to correct underutilization will significant

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[8/] Present regulations require contractors with 50 or more employees and a contract of $50,000 or more to file the EEO-1 report annually. The December 30, 1980, regulations would have retained those levels and provided for accumulation for the dollar amount.

progress be made toward full-scale integration of women and minorities into the jobs from which they have been historically barred.[9] The purpose of the federal contract compliance program is to achieve that progress by requiring such self-analysis and affirmative planning of all companies that have any significant contracts with the federal government. The right of the Government to impose this requirement as a condition of doing business with it has been upheld by virtually every court that has been faced with the issue.[10] Indeed, this right is premised not only upon statutory and executive authority but also upon the Government's constitutional obligation -- "since public funds may not constitutionally be used to subsidize employment discrimination."[11]

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[9] See the discussion of how goals and timetables work to eliminate employment discrimination in Legal Aid Society of Alameda County v. Brennan, 21 FEP 605, 620-21 (9th Cir. 1979): "[G]oals and timetables represent the contractor's own judgment as to the percentage of females and minority members that would be found in his work force if all available qualified persons applied for employment and if all selection processes operated in a completely nondiscriminatory manner. Given this premise, it is entirely reasonable to assume that a contractor who finds a lower percentage of women or minority members in a particular job category in his work force may well be able to correct the deficiency simply by removing obstacles to fair and equal employment..." We would add that it is the creation of specific numerical goals that provides the incentive for such a contractor to discern and then remove the obstacles.

[10] See Contractors Assn. of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967); United States v. New Orleans Public Service, Inc., 553 F.2d 459-465-68 (5th Cir. 1977), vacated on other grounds, 436 21 FEP at 610 n. 14 (9th Cir. 1979). Cf. Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (invalidating OFCCP disclosure regulations); Liberty Mutual Ins. Co. v. Friedman, 24 FEP 1168 (4th Cir. 1981) (invalidating OFCCP subcontractor regulations that cover insurance companies providing workers' compensation policies to government contractors).

Yet the proposed rule would exempt the vast majority -- over 75% -- of federal contractors and subcontractors from the AAP requirement.[12] If the OFCCP is unable to review all 17,000 companies presently subject to the AAP requirement, the answer is not to relieve large numbers of contractors from their responsibility, but rather to follow the model of other law enforcement agencies such as the IRS and to establish clear guidelines for all contractors to follow, demand voluntary compliance, and audit that compliance on a sample basis.

Even accepting the Department of Labor's analysis and rationale for the threshold increases, it cannot be necessary to exempt a full 75% of all companies presently subject to the AAP requirement, reducing the number of employees covered by one quarter, to accomplish the stated goal. Inflation, for example, cannot justify a 20-fold increase in the dollar-amounts threshold.

A further problem with the proposed increase in thresholds is the lack of in-depth analysis of its effect on employment opportunities specifically for women and minorities and ultimately, on the economy and society as a whole. Even if it were true that the proposal would substantially reduce paperwork in terms of AAP preparation, its other effects -- e.g., on unemployment in depressed inner-city areas, on the number of employment discrimination complaints and the cost of defending against them, on the kinds of industries affected by the changes[13] -- have been ignored.

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[11] Castillo v. Usery, 14 FEP 1240, 1250 (N.D. Cal. 1976); see also Norwood v. Harrison, 413 U.S. 355 (1973); Kelsey v. Weinberger, 498 F.2d 701 (D.C. Cir. 1974); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

[12] By OFCCP's own estimates, the number of covered contractors would be reduced from about 16,767 to about 4,143, and the number of required AAP's would be reduced by 78%.

The Women's Equity Action League, for example, has noted a disproportionate effect of such changes on higher education institutions:

> [U]sing reports from the American Association of University Professors and the Federal Procurement Data System, WEAL has documented that in at least one "industry" subject to Executive Order regulations -- academe -- the impact will be far more severe than the Administration's figures show. WEAL has found that at least 219 of the 272 colleges and universities which in 1980 [would have been subject to to Revised Order No. 4 now] would be exempted by the provisions of the new regulations -- a reduction of 81%.
>
> To put it another way, only 19% of those higher educational institutions which [would have been] required to present written affirmative action plans in 1980 would still be so required. Furthermore, less than 30% of all women faculty members who now work at institutions required to have written plans would still have that protection...
>
> WEAL notes that if the new regulations had been in effect in 1980, the following large institutions would not have been required to [maintain] written affirmative action plans: Yale University, Tufts University, Brown University, Ohio University, Columbia University, University of Pittsburgh, Duke University, University of Michigan,

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[13] We believe that because of their nature and structure, some industries, such as the trucking industry, would be almost completely excluded from the AAP requirement under the proposal. We are also concerned that some industries in which there are newly-created job opportunities, such as data processing, may be characterized by small (less than 100-employee) firms and small (less than $1 million) contracts. A more than cursory analysis of the effect of the proposed threshold change (in conjunction with the change regarding aggregation) by industry must be conducted before revised regulations are published for comment.

> University of Alabama, Oklahoma State University, University of Arizona, and the University of Southern California.
>
> Each one of these colleges and universities has been brought before courts and/or federal agencies in the past for discriminatory practices.

WEAL further noted that under the proposed regulations, approximately 25,000 women faculty would now hold jobs at colleges and universities which would be exempt from the AAP requirement.[14]

Institutions of higher education provide only one example of the severe impact that the proposed changes would have. While the Department of Labor has requested that the public comment on their impact in specific industries -- in the (possibly vain) hope that someone will have the answers--that is not sufficient. The Department must perform its own rigorous analysis before implementing so drastic a change in policy and practice.

Abbreviated AAP's for Contractors With 250-500 employees (§§60-1.40(b) and -2.14)

In addition to raising the thresholds substantially and eliminating aggregation, the Department would adopt an "abbreviated AAP" for contractors with 250-500 employees (and, of course, a contract of at least the threshold dollar amount, $1 million). The utilization analysis in this abbreviated form would be based not on major job groups, as in present AAP requirements, but on EEO-1 job categories.

While we do not oppose attempts to create a standardized, shortened, easier AAP, we strongly oppose the proposed means of achieving it. Most important, EEO-1 form data is next to useless for evaluating an employer's work force;[15] indeed, for years constituency groups have been urging the EEOC to revise those forms to require more specific data. If the EEO-1 data is too broad to be adequate for the EEOC's statistical and targeting purposes, how much more inadequate it is in the affirmative action context! The kind of data to be provided in an AAP summary -- established goals and timetables and present utilization -- would be much more useful.[16]

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[14] Testimony of Carol Burrough Grossman, National President of the Women's Equity Action League, before the Senate Labor and Human Resources Committee, July 30, 1981.

Furthermore, the full impact analysis necessary to conservative rule-making is again lacking for this proposal. The most glaring example is the lack of sophisticated analysis of the effect of the definition of "small" companies as those with under 500 employees.[17] A large number of the new jobs created each year emanate from the small business sector; in fact it has been estimated by the Congressional committees with jurisdiction over small business that if every small business hired one more person, it would virtually eliminate unemployment in this country. As the OFCCP's own regulatory impact statement acknowledges, 80% of all news jobs are now created by small businesses. Further, small businesses often supply the training ground for new entrants into a field, as women and minorities are likely to be; from that stepping-stone they can grow into higher-level managerial, technical, or professional positions in larger contractors. Given this reality, the potential impact of lessening the affirmative action obligations of contractors in the 250-500 employee range is very grave.

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[15] The EEO-1 forms merely ask employers to report on the number of employees, by sex and race, in each of nine very broadly drawn job categories.

[16] As discussed more fully below, we might not oppose a modification of the standard AAP that makes job groups easier to ascertain -- e.g., by simply keying job groups to the company's salary structure -- or that streamlines other aspects for smaller contractors (depending on the reults of the impact analysis).

[17] E.g.: How many such contractors are there? Do they predominate in certain industries, or in certain regions of the country? How many women and minorities would be affected by the new regulation?

Elimination of Preaward Reviews (§60-1.20(d) of the current regulations)

Under the proposed regulations, no preaward reviews would be conducted regardless of whether the company involved has never received a federal contract previously, its size, or the number of employment opportunities it creates. Deletion of the provisions relating to preaward reviews means not only that no such reviews will be required but also that no such reviews will be authorized. Thus, there would be no circumstances under which OFCCP could determine in its discretion that it is necessary or appropriate to conduct even a minimal review of a prospective contractor.

We are completely opposed to any move to eliminate or reduce the applicability of the preaward program. The Government's obligation under the Constitution and Executive Order 11246, as amended, is to refrain from awarding contracts to companies that discriminate. A serious program to achieve equal employment opportunity through federal contract compliance must, at a minimum, attempt to ensure that as many prospective contractors as possible are in compliance as a condition of awarding contracts. No program that does not enforce that requirement can be seriously committed to EEO. The preaward review is the only tool available to accomplish this, and cannot be abandoned consistent with the Government's Constitutional obligations.

Furthermore, elimination of the preaward review for educational institutions violates the WEAL Order (Women's Equity Action League v. California, Civil Action No. 74-1720 (D.D.C.)). Thus, at least for prospective contractors that are educational institutions, the preaward requirements prescribed in the WEAL Order must be preserved, on pain of contempt.

Union Participation in the Contract Compliance Process (§60-1.9)

Retreating from the December 30, 1980, regulations, the proposed rule would merely add a requirement that collective bargaining representatives be given notice (in addition to the present requirement of "an adequate opportunity to present their views to the [OFCCP] director") of compliance actions which require a revision of a collective bargaining agreement. This change simply does not go far enough in encouraging union efforts to further equal employment opportunities without trampling upon collective bargaining rights. Effective union participation in the compliance review process can greatly increase the chances that a conciliation agreement will be successful, and may in some circumstances be required by law.[18] But to be effective, that participation must be allowed at various stages of the compliance process, and whenever OFCCP enforcement action may significantly affect the terms and conditions of employment or a substantial number of employees represented by a union. The proposed rule, while giving lip service to the principle of union participation, does not specifically implement the principle.

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[18] See Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977), amended and modified at 556 F.2d 758 (5th Cir. 1977); Southbridge Plastics v. Rubber Workers, 565 F.2d 913 (5th Cir. 1978).

Special Obligations Related to Sex Discrimination (Subpart B)

1. Discrimination in Fringe Benefits (§60-1.21(c)(1))

The proposed regulation amends the OFCCP sex discrimination guidelines to conform them to the Supreme Court's decision in Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978). Manhart invalidated as unlawful discrimination an employer pension plan which required larger contributions from female than male employees in order to receive equal benefits. The theory underlying this holding is that it is unlawful discrimination to treat individual women employees on the basis of stereotyped characteristics of women as a class. This theory mandates that women cannot be treated differently than men in the receipt of employee fringe benefits on the basis of their average greater longevity. Thus, the OFCCP proposed regulation properly requires a gender-neutral rule: that fringe benefits for men and women be sex neutral, regardless of possible differences in contractor contributions.

The proposed rule further recognizes that a differential in benefits, based on differences between the cost to the employer of providing benefits to women as a group and the cost of providing benefits to men as a group, will violate the Executive Order. This aspect of the proposal is also required under the Manhart decision. Although the Court was not confronted with a defined contribution plan which paid different benefits to men and women, its opinion nonetheless made clear its intent to reach and prohibit sex-based differentials in both benefits and employee contributions.

First, the Court in Manhart went out of its way to criticize the Wage and Hour Division's regulation which requires an employer to equalize either his contributions to a pension plan or employee benefits. This became known as the "either-or" rule, and would be eliminated by the present proposal. Since OFCCP has adhered to the same rule [41 CFR 60.20(3)], it, too, is subject to the same criticism and has properly proposed this change.

Similarly, the Court in Manhart specifically approved the Wage and Hour regulation -- reflected in OFCCP's proposed amendment -- that wage differentials based on differences in the average costs of employing men and women are not based on a factor other than sex. It endorsed the rationale that such differences assume that the sex factor alone may justify wage differences and thus serve only to perpetuate sex discrimination.

Finally, the Court in Manhart explicitly approved of an entirely gender neutral system of contributions and benefits. It pointed out that such a system would pay retirees with long lives more than those with short lives. Although it might result in women as a class receiving greater benefits than men as a class, it would nonetheless be discriminating precisely on the basis of longevity and imprecisely on the basis of sex rather than the other way around.

2. Discriminatory Wages (§60-1.23(a))

The proposed provision on the issue of discriminatory wages simply reiterates the prohibition in the present regulations:

> The contractor's wage schedules must not be related to or based on the sex of the employees.

This, we believe, correctly states the law in this area. The December 30, 1980 regulations, on the other hand, expanded on this prohibition with an illustration indicating that sex discrimination in wages might occur even when women and men are not performing work that is "equal" within the meaning of the Equal Pay Act.

We supported this illustration, and deplore its omission in the present proposal. The recent Supreme Court case, Gunther v. County of Washington, establishes that discrimination in wages may violate Title VII of the Civil Rights Act. By omitting any reference to such forms of discrimination, the OFCCP sends a clear signal to contractors that they can safely ignore the Supreme Court mandate, at least for purposes of federal contract compliance. At the same time, the OFCCP does a disservice to contractors by failing to apprise them of their obligations in this area. We urge the Department to include the explanatory material in the final regulations.

3. Pregnancy, Childbirth, and Related Medical Conditions (§60-1.24)

The proposal carries forward the EEOC's parallel Guidelines on Pregnancy Discrimination (29 CFR 1604.10), with one exception: it omits the section that interprets the well-established principle that neutral policies with a disparate impact on a protected class may be unlawful, in the context of neutral employer policies covering pregnancy and related medical conditions.[19]

This change would render the substantive requirements under Executive Order 11246, as amended, directly inconsistent with contractors' obligations under Title VII. It is utterly ridiculous for the Department of Labor on the one hand to assert that it is attempting to minimize inconsistent and duplicative EEO requirements for business, and on the other to set out substantive guidelines for contractors that do not coincide with the EEOC's interpretation of Title VII law, with which contractors must also comply. Indeed, no persuasive justification for this inconsistency is offered.

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[19] 29 CFR 1604.10(c), which provides:

> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

Not only are these proposals inconsistent with EEOC's interpretive guidelines, which are entitled to and have been accorded great deference by the courts, but also with established case precedent. Indeed, the United States Court of Appeals for the District of Columbia Circuit has very recently cited this section of the EEOC Guidelines with approval in a case holding that an employer's lack of adequate leave policy may be sex-based employment discrimination because of its disparate impact on pregnant women. Abraham v. Graphic Arts International Union, 26 FEP Cases 818 (D.C. Cir. 1981).20/ Regardless of the Department of Labor's interpretation of the law, contractors should not be subject to conflicting obligations.

4. Sexual Harassment (§60-1.25)

Similarly, the proposal would adopt a substantive interpretation of the prohibition of sexual harassment that is inconsistent with the EEOC's Guidelines (29 CFR 1604.11) and that weakens the protections they afford. The proposal omits the section that governs a contractor's responsibility for the sexually harassing acts of non-employees to the extent that these acts and their effect are within the contractor's control (29 CFR 1604.11(e)).

20/ See also Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (invalidation of seniority and leave policies which placed an undue burden on pregnant women as unlawful sex discrimination).

Again, we are totally opposed to this inconsistency in interpretation. There is no reasonable justification for it; it leaves a large loophole in the hard-won protection against sexual harassment; and it is inconsistent with Title VII law.

For example, in EEOC v. Sage Realty Co., 507 F.Supp. 599, 21 FEP Cases 1521 (S.D. N.Y. 1981), the employer was held responsible for sexual harassment of a woman employee by non-employees that resulted from the employer's dress code requirement of a revealing uniform. To the extent that maintenance of a sexually (or racially) discriminatory work environment is within the employer's control, failure to correct the discrimination is unlawful under Title VII; as the EEOC Guidelines recognize implicitly, there is no reason for a different rule when the discrimination involved is sexual harassment.[21]

There is no doubt that sexual harassment by non-employees can pose a serious problem for women employees. Women Employed recently received a plea for help from a young, married woman in West Virginia who works in a small store alone at nights and is harassed every week by a salesman from a grocery company. In her words:

> All he ever talks about is getting into my pants. For a while that's all it was; talk. Now, he has started grabbing me, and pinching and making real grosque [sic] gestures. I have told him to stop, I have asked him nicely, but I guess he doesn't take me seriously.... I can't take it much longer.... I have

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[21] See Bundy v. Jackson, ___F.2d___ (D.C. Cir. 1981) and cases cited therein.

> even considered quitting.... I have
> not told my boss yet because I'm afraid
> he would not understand. Would it really
> help me to file a complaint with my
> local EEOC office?

This woman is not alone in her plight. Yet the OFCCP proposals would overlook her entirely.

Omission of Provision for Access to Computer Tapes and Printouts (§60-1.43)

The December 30, 1980, regulations would have added computer tapes and printouts to that data that the OFCCP can request in a compliance review or complaint investigation; this proposal deletes that addition.

We oppose this deletion strongly. In today's industry, computerized data bases often provide the best, most up-to-date information about a company's workforce and employment practices. To deny the OFCCP access to such "state of the art" data opens an enormous loophole for contractors.

Indeed, in the Preamble the Department asserts that it "does not intend that OFCCP be precluded from obtaining" such data, "in appropriate circumstances," but that "due to possible greater problems with...confidentiality...it is not appropriate for OFCCP to mandate access to computer tapes and printouts" (46 F.R. at 42972). This is an entirely specious argument. In the first place, inclusion of "computer tapes and printouts" in §60-1.43 would not "mandate" that they be turned over in any case; rather, that section merely authorizes OFCCP's access. In the second place, computer data is subject to no less assured confidentiality than other types of data; on the contrary, computer data would not generally be useful to potential charging parties who are most unlikely to have access to computers. If OFCCP does intend to maintain access to computer data, no purpose whatsoever is served by deleting the language from the provision.

Third-party Complaints (§60-1.62(a))

The proposed regulations, like the December 30, 1980, regulations, would allow for the filing of complaints by third parties. However, this proposal adds a serious impediment to such third-party filings by requiring that "alleged discriminatees be identified to the extent known."

We are irrevocably and adamantly opposed to this new requirement. It contravenes the purpose of third-party complaints -- i.e., to assure victims of discrimination of protection from retaliation as much as possible. It flies in the face of all past EEO practice. It reflects a total lack of understanding of the nature of retaliation which complainants regularly face. Most often, retaliation takes forms that are subtle and hard to prove. Common are the following forms:

- Training courses become unavailable.
- Work assignment deadlines get shorter.
- Performance evaluations begin to deteriorate, slowly. Pay increases may be lower because of bad evaluations.
- At meetings, points made are never recognized.

- Promotions are difficult or impossible to get. Every experience and training criterion is strictly enforced. Attendance records are scrutinized.
- No new or different assignments; it's always the same old work.
- Fellow employees ostracize complainants, or shut them out of key information networks.

Thus, the new requirement completely disregards and invalidates the collective experience of women and minorities, gained in the many years of filing discrimination charges. The result is a chilling effect on reporting of discrimination. This provision must be deleted from the regulations.

Processing Complaints (§60-1.63)

In this provision as well, the proposal would adopt a salutory change that had been made in the December 30, 1980, regulation by codifying the OFCCP's practice of retaining and investigating class or systemic complaints.[22] However, the advantages of this revision are again significantly undermined by addition of a further proviso to the effect that --

> the existence of unresolved individual complaints shall not preclude a determination that the contractor's affirmative action program is acceptable.

(§60-1.63(b)(2)).

This proviso is unacceptable, both as a matter of law and as a matter of policy. As a matter of law, the Executive

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[22] We note that the proposed regulation unnecessarily inserts the word "normally" into the provision describing the circumstances under which it would retain and investigate complaints. This word should be deleted.

Order itself requires that a contractor not discriminate or be debarred. The Department of Labor cannot by fiat change its obligation to enforce that mandate. If outstanding complaints, whether individual or class, indicate that a contractor not only may have practiced discrimination but also has failed to eliminate and remedy it, no finding of compliance is possible.

As a matter of enforcement policy, complaints provide one of the best sources of information for the OFCCP to use in determining whether the general promises of nondiscrimination contained in the EEO clause and in the AAP are being fulfilled. To disregard this information is tantamount to irresponsible enforcement action.

Elimination of Review by OFCCP Director of Staff Determinations

The proposed regulations would eliminate the present 45-day opportunity for review by the OFCCP Director of conciliation agreements and acceptable AAP's. Instead, the "sign-offs" on these determinations would be made at the regional level.

We oppose this change. Some right of appeal to the Director should be maintained; however, to shorten the time and increase certainty, we would propose that the regulations provide that determinations would be final unless disapproved by the Director after some shorter period of time (e.g., 15 working days).

Prohibition of Intimidation or Interference (§60-1.67)

We support the proposal's strengthening of the prohibition of intimidation or interference. Under the new regulation, any person who has opposed an employment practice unlawful under any federal, state, or local law, is declared protected from retaliation.

Limitation of Back Pay to Two-Year Period (§60-1.71)

The proposal would add a section expressly limiting contractors' liability for back pay to a period two years prior to the date of contractor notification "of a potential compliance problem involving back pay."

Assuming that the back pay remedy is maintained -- an issue about which our views are discussed more fully supra -- we nevertheless oppose this two-year limitation as much too limited and much too inflexible. As noted above, it is inappropriate for the OFCCP to lock itself in advance into such positions, which should be matters of enforcement discretion addressed on a case-by-case basis. More importantly, the two-year limitation is inconsistent with the Equal Pay Act's three-year statute of limitations where the back pay problem involves a willful violation. Failure to conform the OFCCP practice to this federal law will create inconsistent obligations for contractors.

Consolidated AAP's (§60-2.1(c))

The Department of Labor proposes to allow contractors with more than one establishment to consolidate the AAP's for several small establishments into one, regardless of geographical area. Our position is that combining should only be allowed for small establishments that are geographically proximate and in the same chain of command within the company. Moreover, if combining is permitted, the consolidated AAP must show availability data, under-utilization analysis, and goals and timetables for each establishment. It is necessary that this analysis be done by establishment because the availability determination is sensitive to extremely local variation. Thus, for example, in Legal Aid Society of Alameda County v. Brennan, supra, the appeals court affirmed provisions of the district court's order that to determine availability, contractors must adopt the labor area (of three possible choices: SMSA, County, or City) that has the highest minority population (unless there is a written justification for choosing another labor area). 21 FEP Cases at 619. Separate data will also ensure that contractors do not mask discriminatory statistics within larger data bases.

"Extended Duration" Five-Year AAP's (§60-2.3(c))

The Department adds a five-year exemption from compliance reviews for those contractors which have an approved AAP (after an on-site compliance review in which they have been found to be in compliance), and have agreed to link their recruitment and training with approved programs.

We strongly oppose such an attempt to exempt contractors from on-going compliance reviews for so long a period of time and under such conditions. In the first place, five years is an extremely long time period in our fast-paced, constantly-changing, technologically-based economy. An AAP that is acceptable for a company in 1981 may well be completely irrelevant for that company's work force in 1986. Second, the enforcement of conciliation or settlement agreements negotiated during a compliance review is often a difficult process requiring on-going monitoring; but the Department's five-year exemption proposal makes no provision for it. Third, the five-year exemption defies usual procurement practices in which on-going review of compliance with the contract terms is a matter of course. Virtually all contracts involve performance of tasks to meet specified standards over the duration of the contract; there is no reason why the same should not be true of contractual affirmative action obligations. Fourth, there is no guarantee that the linkages with training programs will create any specific employment opportunities for women and minorities; to the contrary, training programs themselves are not necessarily nondiscriminatory or may operate to lock in the effects of past discrimination. Lastly, there is no need to create a rigid five-year exemption to ensure that contractors who are generally in compliance are not subject to unnecessary and repetitive compliance reviews. That objective can be accomplished simply by rational scheduling of compliance reviews.

In any event, it appears that any exemption proposal is in need of substantial clarification. A mechanism for triggering compliance review during an exemption period must be provided when the contractor's reports or other information indicates that compliance may be slipping; or when a major change in a contractor's employment circumstances occurs (such as award of a large contract, sudden growth, or changes in establishment location). Further, the data that a contractor would have to provide during an exemption perio must be specified; at a minimum, the progress information provided in an AAP summary[23] should be required, so that information about compliance in terms of promotion and pay practices, and not just in terms of hiring and training (the natural result of training linkage) would be available. Further, the terms of the training linkage aspects of the exemption must be specified much more precisely. Finally, if an extended exemption period is adopted, the OFCCP must be involved in any goal-setting or AAP changes which occur during that period.

The extended duration AAP that is proposed is dependent on investigation of outstanding complaints (§60-2.3(c)(1)); for the reasons mentioned above in the discussion involving resolution of individual complaints in compliance reviews, it is crucial that both outstanding individual complaints and class complaints be not only investigated but also resolved prior to approval of an extended AAP.

Underutilization Analysis (§60-2.11(b))

The present regulations require a contractor to make a declaration of underutilization whenever there is a short-fall between the actual number of minorities or women in a job group, and that number that would be reasonably expected by their availability. The proposed regulation creates a presumption that there is no underutilization for job groups in which the employment rate of minorities or women is at least 80% of their availability. Thus, if the expected availability of minorities in a particular job group were 40%, then the contractor would neither have to declare underutilization nor prepare an AAP unless the actual proportion of minorities in the job group were less than 32%.

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[23] See the discussion of AAP summaries, infra at p. 40.

We oppose the institution of this presumption. Allowing this big variation from availability condones levels of underutilization that the courts have held to be prima facie evidence of unlawful discrimination under Title VII of the Civil Rights Act of 1964.[24] The result of this proposal is unconscionable and untenable: that a contractor with underutilization so substantial that it alone may be evidence of unlawful discrimination, will not even be required to develop a plan to correct the problem as a condition of being awarded a federal contract. We support the present regulations' concept that the ultimate objective of setting goals and timetables is for the contractor to achieve parity with the availability of qualified minorities and women in the relevant labor market.

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[24] Cases applying this principle are legion; among the principal ones are, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hazelwood School District v. United States, 433 U.S. 299 (1977).

If the objective of this proposal to revise underutilization determinations is to avoid the sometimes unworkable results of the strict parity approach (in which, for example, contractors might find deficiencies of a fraction of a person), we believe that other methods, which do not involve condoning facial discrimination, can be devised to accomplish this goal. In fact, the overall effectiveness of the contract compliance program would be greatly enhanced if the OFCCP regulations were revised to change the definition of job groups now used in AAP development. Job groups are defined as "one or a group of jobs having similar content, wage rates, and opportunities."[25] This definition has proven inadequate when applied to the organizational characteristics of many companies and common to many industries. In a great number of cases, the job groups are defined so narrowly that they produce goals which are numerically insignificant (the "fraction of a person" problem). In a great many other cases, the definition results in a broad mix of traditional and non-traditional jobs (*e.g.*, nurses and engineers) being included under one "job group" and thereby generates placements which tend to perpetuate discrimination or otherwise to allow for goals which are not qualitatively meaningful.

Thus, a more appropriate approach would be to establish job groups by salary or wage increments within EEO-1 categories (professionals, sales, etc.). This would focus attention on the real purpose of goals and timetables -- the increased participation of women and minorities in better-paying jobs -- regardless of organizational structure. It is this type of change in utilization and availability analysis which should be undertaken.

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[25] 41 C.F.R. 60-2.11(b).

Elimination of the AAP Summary (§60-2.14 of the present regulations)

Present regulations[26] require contractors subject to the AAP requirement to submit annual AAP summaries. The Department of Labor is proposing the elimination of this requirement, claiming merely that it "considers [it] to place an undue reporting burden on contractors" (46 F.R. at 42976). We strongly oppose this course of action.

Under present procedures, no systematic review of contractors' affirmative action plans is made. There is no established mechanism for insuring that a contractor's performance under its affirmative action plan will even be reviewed by the OFCCP. In fact, many contractors never prepare or file acceptable affirmative action plans at all. The requirement of annual AAP summary submissions does not alone guarantee review of affirmative action programs, but it does impose on contractors a regular assessment of their affirmative action performance, and serves as an additional incentive to comply with affirmative action standards. The information provided on EEO-1 forms is woefully inadequate to any useful assessment of a contractor's success at fulfilling its EEO obligations. Essentially, effective evaluation of a contractor's compliance status is impossible under present reporting requirements. The AAP summary is a necessity.

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[26] 41 CFR 60-2.14. This section of the regulations is presently in effect, having been published in final form on December 28, 1979 (44 FR 77000). However, because a form for the summary has never been adopted, the provision has not been implemented.

Indeed, we do not see how the federal contract compliance program can be intelligently run without the AAP summary mechanism. If implemented, it would require federal contractors, for the first time, to report the level of their goals, hiring rates, underutilizations, applicant flow and other data necessary to determine compliance with Revised Order No. 4. Without this information, OFCCP does not even know whether the large percentage of federal contractors which it does not review have affirmative action programs, let alone adequate goals and hiring rates. Submission of this information to DOL will also induce federal contractors voluntarily to adopt appropriate programs, goals and hiring rates without placing the heavy resource burden upon OFCCP that is necessitated by compliance reviews. Finally, the information may be fed into OFCCP's computerized system to enable greatly improved target selection and monitoring. Under the present informational system, OFCCP cannot effectively allocate its very limited resources to those reviews that will have the greatest impact upon employment of protected groups.

The Department's fears that the AAP summary reports are too burdensome for contractors are unwarranted and short-sighted. First, the AAP summary requirement will benefit those contractors who are now subjected to poorly selected reviews and who would not be reviewed if OFCCP could obtain the requisite data prior to targeting reviews. Second, it does not impose a new data collection requirement: there is already an OFCCP regulation which requires federal contractors to evaluate and update their AAP's annually. Thus, contractors already have the burden of obtaining such information. The only added element is that federal contractors now must submit the information to DOL. That requirement is hardly a burden, although it may be so viewed by those seeking to hide their noncompliance. Third, the AAP summary is not duplicative since OFCCP requires no such reports now. The EEO-1 information required by EEOC simply does not cover data such as goals, hiring rates, and underutilization.

Thus, the AAP summary is the backbone of any streamlined enforcement program. Its use could substantially reduce paperwork for contractors while supplying both contractors and the OFCCP with the specific information necessary to assess the success of compliance efforts.

Moreover, the AAP summary provision was promulgated as the result of several court actions and decrees: Legal Aid Society of Alameda County v. Brennan, 381 F.Supp. 125, 8 FEP 178 (N.D. Cal. 1974), aff'd, 21 FEP Cases 605 (9th Cir. 1979); the WEAL Order, supra.

Omission of Standards for AAP's (Part 60-2, Subpart C)

The Department omitted from the regulations those parts of Revised Order No. 4[27] that supply suggestions to contractors as to how they may comply with the standards regarding acceptable AAP's. We oppose this omission. We have historically supported these sections of Revised Order No. 4 because employers need more guidance, not less, on all aspects of preparing and implementing AAP's. Standardization of AAP requirements can decrease the burdens of compliance that contractors feel by clarifying their responsibilities and ensuring that major areas of their practices are not overlooked.

At a minimum, Subpart C should be published as an interpretive bulletin. Indeed, prior to this publication Secretary of Labor Raymond Donovan and Solicitor of Labor Timothy Ryan had assured us that this was their intention.

Sections Affecting Construction Contractors

The proposed regulation would create dual thresholds for construction contractors. The existing threshold of $10,000 would trigger the basic requirement not to discriminate and to take affirmative action. Only at a new, higher threshold -- for contractors that have contracts of at least $50,000 and that employed craftworkers for at least 20,000 hours in any consecutive six months during the 12-month period immediately preceding the contract award -- would the construction industry goals and timetables and specific affirmative action steps be required.

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[27] Subpart C, "Methods of Implementing the Requirements of Subpart B," §§60-20 - 60-2.26.

We are opposed to this proposal. As in the service and supply threshold changes, it reduces the number of contractors subject to any meaningful affirmative action requirements. Nowhere in the proposed regulation or in the preliminary analysis does the Department of Labor even attempt to estimate how many contractors would escape through this loophole. Absent any such assessment, the threshold changes must not be adopted. Further, the 20,000-hour provision is seriously flawed. The Department contends that the requirement is roughly equivalent to a threshold of 20 employees. However, that formulation assumes steady full-time employment, an assumption that fails to take into account the seasonal and cyclical nature of employment in the construction industry. Beyond that, the proposed regulation provides that contractors will be required to state whether they meet the 20,000-hour threshold as part of their bids; jurisdiction will be determined on the basis of those statements. This approach means that contractors themselves will be deciding whether they are covered, and because of the way the threshold is framed, it would be very difficult for the OFCCP to verify.

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In sum, we oppose any proposals that would weaken enforcement of contractors' obligations under Executive Order 11246, as amended. Such proposals are of particular ocncern in light of the concurrent cut-backs in social programs due to the Administration's federal budget cuts. In the short run at least, women and minorities will be disproportionately affected by these cut-backs, and will be forced to bear a greater proportion of the resultant economic sacrifices. To deprive them at the same time of strong and effective enforcement of the mandates that protect them from invidious discrimination when they are employed is intolerable. It makes a travesty out of this nation's commitment to equal opportunity for all.

Working Women Speak Out

A Survey of Working Women 1981

INTRODUCTION

Women Employed has conducted its second annual Working Women's Survey to determine how women view their jobs, their advancement opportunities, and equal opportunity programs. Women were asked how they felt corporations will respond if government programs to enforce equal opportunity laws are reduced. They were asked whether they feel employers provide equal opportunity, and whether they feel they are moving ahead as quickly as men with comparable education and experience. They were also asked their opinions about specific employer policies which contribute to ensuring equal opportunity: job posting, career paths, problem-solving procedures, and structured salary systems. The results are a unique compilation of working women's views.

Twenty-five thousand survey forms were distributed at transportation sites, large office buildings, and through office networks during June, July, and August, 1981. Eighteen hundred seventy-two completed surveys were returned. The respondents included 453 clerical workers, 482 secretaries, 801 professionals, and 136 managerial women.

SUMMARY OF FINDINGS

Women overwhelmingly feel that employers would do less, not more, to provide equal opportunity if federal programs to enforce equal opportunity are reduced. Almost two-thirds of the respondents have personally experienced discrimination in hiring, training, promotion, and

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pay, or have been the victims of sexual harassment. Significant numbers of women do not feel their employers provide equal opportunity in promotion and pay; however, they are less critical of hiring and training policies. Over half of the women who responded do not feel that they are moving ahead in their jobs and careers as quickly as men with comparable education and experience.

Women expressed strong support for employer policies designed to promote equal opportunity, such as job posting and career paths, yet they report that few of their employers have instituted such policies.

Over two-thirds of the women also felt that employer-sponsored childcare was a good idea, and 93 percent supported flextime.

Overall, women clearly felt that they cannot rely on employers to provide equal opportunity and to assist them in their careers. Only 14 percent either anticipate a promotion at their next job evaluation or expect that they will be promoted regularly. The vast majority feel that the next step in their job or career depends on their own initiative--leaving their current job, changing careers, or seeking additional education.

SURVEY FINDINGS

1. EMPLOYERS WILL DO LESS TO PROVIDE EQUAL OPPORTUNITY IF GOVERNMENT REQUIREMENTS ARE REDUCED.

Women overwhelmingly believe that employers would do less to provide equal opportunity for working women if government programs to enforce equal opportunity laws are reduced. Seventy-eight percent of all respondents expressed this view. Slightly more managers and professionals view government equal opportunity regulation as necessary, reflecting the fact that more of these women have seen the benefits of such requirements than women in clerical and secretarial positions. Only 12 percent of the respondents felt that government regulations make no difference because women have equal opportunity now.

QUESTION: There have been suggestions recently that there is too much enforcement of equal opportunity laws. If government programs to enforce these laws are reduced, what do you think would be the result? (a) corporations would do more to provide equal opportunity for working women, (b) corporations would do less to provide equal opportunity for working women, (c) no difference; women have equal opportunity now.

	TOTAL	C*	S*	P*	M*
Corporations would do more to provide equal opportunity for working women	10%	13%	12%	8%	5%
Corporations would do less for working women	78%	76%	74%	82%	82%
No difference; women have equal opportunity now	12%	11%	14%	10%	13%

2. MANY WOMEN BELIEVE THEY ARE NOT MOVING AHEAD AS QUICKLY AS MEN WITH SIMILAR EDUCATION AND EXPERIENCE.

Over 50 percent of the women who responded do not feel they have the same opportunities for advancement as men. Almost two-thirds of the secretaries and clericals expressed this opinion, reflecting the lack of career paths in traditionally female fields. However, almost half of the women in professional and managerial jobs indicated a similar opinion. This may reflect problems women have in obtaining promotions

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*C = Clericals
S = Secretaries
P = Professionals
M = Managers

at the same rate as men in comparable positions even when they reach professional or managerial job classifications.

QUESTION: Do you feel you are moving ahead in your job or career as quickly as men with similar education and experience?

	TOTAL	C	S	P	M
YES	44%	35%	39%	51%	52%
NO	56%	65%	61%	49%	48%

3. MANY WOMEN HAVE PERSONALLY EXPERIENCED DISCRIMINATION.

Two-thirds of the respondents stated that they had experienced discrimination in hiring, training, promotion, job placement, or pay, or that thay had encountered sexual harassment. This may explain why women feel the need for government regulations they can rely on when they face problems of discrimination at work.

	TOTAL	C	S	P	M
Have experienced discrimination	66%	62%	62%	68%	68%
Have not experienced discrimination	26%	29%	30%	23%	25%
Don't know	8%	9%	8%	9%	7%

4. MANY WOMEN FEEL THEIR JOBS ARE "DEAD-END", THAT THERE ARE NO OPPORTUNITIES FOR ADVANCEMENT.

Almost half of the respondents feel their jobs are dead-end. Two-thirds of the secretaries expressed this view, reflecting the lack of promotion opportunities for secretaries. Over 30% of the women in managerial jobs also feel their jobs are dead-end. This percentage was higher than anticipated. It appears that many managerial women attain entry or even middle-management positions, and then face barriers as they try to move higher up the corporate ladder.

QUESTION: Do you feel that your job is "dead-end", that there are no opportunities for promotion?

	TOTAL	C	S	P	M
YES	48%	58%	66%	35%	32%
NO	52%	42%	34%	65%	68%

5. MANY WOMEN FEEL THAT EMPLOYERS DO NOT PROVIDE EQUAL OPPORTUNITY FOR MEN AND WOMEN IN PROMOTION AND PAY.

The respondents are critical of their employers' promotion and pay policies. Almost one-half (46%) feel that their employers do not provide equal opportunity in promotions; almost as many (41%) do not believe their employers provide equal opportunity in pay. Two-thirds of the respondents, however, feel that their employers provide equal opportunity in hiring and training.

QUESTION: Do you feel your employer provides equal opportunity for men and women employees in promotion?

	TOTAL	C	S	P	M
YES	40%	31%	37%	45%	46%
NO	46%	54%	43%	44%	46%
DON'T KNOW	14%	15%	20%	11%	8%

QUESTION: Do you feel your employer provides equal opportunity for men and women employees in pay?

	TOTAL	C	S	P	M
YES	37%	38%	27%	41%	37%
NO	41%	42%	48%	38%	37%
DON'T KNOW	22%	20%	25%	21%	26%

6. VARYING VIEWS ON WOMEN'S OVERALL SITUATION.

A substantial number (42%) feel that the overall situation for working women in terms of promotion opportunities has improved in the past year despite their individual experiences. A somewhat larger percentage feel that women's overall situation has stayed the same. This may explain women's view that reducing government regulations will have an adverse effect on their opportunities.

QUESTION: In the past year, do you feel that the overall situation for working women in terms of promotion opportunities has:

	TOTAL	C	S	P	M
Improved	42%	39%	42%	46%	30%
Stayed the same	49%	51%	52%	44%	56%
Gotten worse	9%	10%	6%	10%	14%

7. MANY WOMEN ARE DISSATISFIED WITH THEIR CURRENT SALARY.

Women ranked salary, raises, and fringe benefits as their chief job concerns. Over half (54%) are dissatisfied with their current salaries. Not surprisingly, clerical workers were more likely to express dissatisfaction than other groups, since their wages are by far the lowest.

QUESTION: How do you feel about your current salary?

	TOTAL	C	S	P	M
Very dissatisfied	18%	34%	22%	10%	8%
Somewhat dissatisfied	36%	47%	35%	31%	29%
Very satisfied	15%	7%	13%	18%	29%
Somewhat satisfied	31%	12%	30%	41%	35%

8. WOMEN SUPPORT EMPLOYER POLICIES TO PROMOTE EQUAL OPPORTUNITY.

Certain formal employment policies have been identified as effective in eliminating barriers for women and creating fair employment conditions. These include job posting, career paths, problem-solving or grievance procedures, and structured salary systems. While women overwhelmingly favored these policies, less than half reported that their employers have such policies.

Job Posting

Job posting systems provide for the posting of job openings on employer bulletin boards so that any employee with the requisite skills for the job can apply. Such systems eliminate reliance on the "old boy" network of contacts for filling positions which has resulted in the exclusion of women from jobs they might otherwise have been considered for. Job posting allows employees interested in advancement to take the initiative to apply.

While 94% of the respondents felt job posting is a good idea, less than half reported that their employer has job posting.

Career Paths

Career paths provide formal steps for advancing from job to job, and outline promotional opportunities both within individual departments and throughout a company. Career paths provide steps to advance from clerical or secretarial jobs to technical or professional positions and from lower-level to higher-level professional and managerial jobs.

While three-fourths of the respondents felt career paths are a good idea, only 23 percent reported that their employers have career paths.

Structured Salary Systems

Formal job codes and salary ranges for jobs help to ensure equal pay for equal work and equitable salaries for men and women employees. When salary ranges for job classifications are made public to employees, salaries are more likely to correspond to the actual jobs, reducing the potential for discrimination by individual supervisors.

While 60% of the respondents said their employers have a structured salary system, only 28% responded that salary levels are public. However, 78% feel that salary ranges should be public.

Problem-Solving Procedures

Problem-solving or grievance procedures provide steps for dealing with problems such as unfair job evaluations, denial of promotion, or sexual harassment. Such steps, formally structured, provide avenues for resolving problems beyond just talking to an immediate supervisor.

While 93% of the respondents feel this is a good idea, only 36% stated that their employer has problem-solving procedures.

9. MANY WORKING MOTHERS SUPPORT EMPLOYER-SPONSORED CHILDCARE.

Almost half of the 421 working mothers who completed surveys have problems finding childcare for their children while they work. Not surprisingly, therefore, 72% feel that employer-sponsored childcare centers for employees' children are a good idea. Almost two-thirds of other respondents also support such childcare programs.

QUESTION: Do you have problems finding childcare?

	TOTAL
YES	46%
NO	54%

QUESTION: Should employers establish childcare centers for employees?

	MOTHERS	OTHERS
YES	72%	66%
NO	18%	20%
DON'T KNOW	10%	14%

The vast majority of all respondents also support flextime. Ninety-three percent of the respondents feel that flexible working hours are a good idea. Various alternatives for flextime exist. One alternative is flexible starting and quitting times. Employees select the times they will begin and end work; all employees work during designated core periods. Another alternative is a system of banking and borrowing hours which allows employees to work varying numbers of hours each day as long as the required numbers of hours per week is worked. Flextime provides a way for employees to deal more easily with the demands of job and family responsibilities.

CONCLUSION

The 1981 Working Women's Survey results indicate the need for continuing efforts to make equal opportunity for working women a reality. Women clearly feel the need for federal programs to ensure fair hiring, training, promotion, and pay policies. Women also support voluntary employer programs designed to promote equal opportunity. These programs include job posting, career paths, structured salary systems, and problem-solving procedures.

What emerges from the survey is the disparity between the idea of equal opportunity and the reality women face in the job market. While women are taking responsibility for developing their careers, employers are not responding with concrete programs of their own to ensure equal opportunity. Employers may feel that they have established guarantees for treating male and female employees equally, but working women do not perceive that employers practice equal opportunity, particularly in promotion and pay. Women's personal experiences with discrimination undoubtedly provide the basis for this viewpoint.

From women's point of view, if government enforcement programs are reduced, employers will do less to provide equal opportunity. The Reagan administration is currently initiating just such de-regulation programs.

The opportunities women currently have access to have been created by pressure from government agencies responsible for enforcing equal opportunity laws. The survey results show that women have come to expect equal opportunity as a basic right. If deregulation goes forward, the challenge to provide equal opportunity will fall on corporations directly. And women will continue to insist on their right to equal treatment.

The CHAIRMAN. Thank you.

Ms. Estrada, we will turn to you now.

STATEMENT OF CARMEN A. ESTRADA, MEXICAN AMERICAN LEGAL DEFENSE FUND, SAN FRANCISCO, CALIF.

Ms. ESTRADA. Thank you. On behalf of the Mexican American Legal Defense Fund, we are pleased to be here to testify today on this important issue.

We believe that affirmative action is an essential tool in the national effort to provide true employment and educational opportunity for members of groups to whom it has been denied in the past. The Federal Government should not diminish its current efforts to promote equal employment opportunity and affirmative action in the public and private sectors. We urge the continuation of existing Federal agency enforcement of equal employment laws and will make specific recommendations to increase its effectiveness.

Parts of my testimony address the way affirmative action has benefited Hispanics. I will not summarize that at this time, since it is before you in the record.

The Federal Government's role in achieving equality of opportunity for all Americans is vital, and the current administration's proposed revision of that role, through budget cuts affecting civil rights enforcement programs and regulatory revision, will jeopardize recent efforts to improve Federal civil rights enforcement activity.

The contract compliance program under Executive Order 11246 has for 15 years been the centerpiece for the Federal enforcement effort. Like the Government's litigation under title 7 and its activities through the equal employment opportunity, the contract compliance program, while imperfect and frustratingly slow in approaching its noble goal of eliminating employment discrimination, has on the whole been sincerely and positively dedicated to achieving its purpose.

Until recently no administration and no Congress has seriously entertained proposals to make civil rights enforcement less effective or the continuation of employment discrimination easier. In its enforcement program under the Executive order, the Government always tried, usually with at least some measure of success, to be part of the solution and not part of the problem.

This consistent bipartisan commitment to eliminating employment discrimination has recently come under attack from both the Congress and the executive branch. We are deeply troubled and feel gravely threatened by indications that the Federal Government may dilute or destroy the effectiveness of the contract compliance program in the guise of, or perhaps as an incidental consequence of, regulatory reforms designed to reduce paperwork and restore business prerogatives.

We are alarmed both by the real impact that such a retreat would have on Hispanic job opportunities and by the broader psychological damage that would be dealt to the dream of racial equality by regressive actions of great symbolic importance.

I am therefore here today to urge the committee and the Senate to resist pressures to undermine the contract compliance program. By all means simplify, streamline, and reduce paperwork and bureaucracy, but not in ways that cut at the heart of the contract compliance program's vitality.

It is important to note that significant coordination has been achieved in the policies, procedures, and operations of the two Federal agencies with major compliance programs affecting private employers, the EEOC and the OFCCP. As a result, many areas of inconsistency and duplication will be eliminated and costs to employers in the Federal Government should be reduced substantially.

The interagency memorandum of understanding which EEOC and OFCCP concluded in January 1981 should eliminate duplicative investigations and compliance review, substantially reduce paperwork and other costs for private employers, and improve procedures for processing individual complaints.

These interagency coordination activities are the result of recent efforts to streamline Federal equal employment opportunity programs and address the concerns of employers while improving service to protected groups. This coordination process is long overdue and will greatly enhance the Federal Government's equal employment activities.

Any serious attempt to improve the Federal role in increasing employment opportunities for women and minorities must address the major problems identified in previous hearings head on, and those are the problems of duplicative investigation and inconsistent investigation procedures creating major paperwork burdens, being costly to employers and the Federal Government, as well as inconsistent and confusing interpretation of standards and regulations.

But rather than dismantling existing Federal employment programs and allowing employers voluntary affirmative action efforts to determine the pace of our Nation's equal opportunity efforts, a review and revision of Federal agency action in this area designed to improve agency efforts should be the major focus of the current administration.

Among those actions which would improve current Federal agency activities are the following: I give several examples, and I will only read a few.

There must be continued efforts to coordinate the various Federal sector equal employment programs, including coordination to insure consistency of Federal affirmative action requirements, of instructions and reporting requirements for affirmative action programs, and of revisions of EEOC regulations on the collection of minority data.

There must be coordination and review of Federal agency equal employment issuances to eliminate inconsistencies, and to develop regulations and interpretations which clearly and properly define legal requirements.

There must be the development of standardized complaint processing procedures, to the extent feasible under law, to standardize requirements for timely filing of complaints, for formats and contents of complaints, criteria for dismissal of complaints, and other complaint processing procedures.

There must be the development of expanded systematic information sharing between agencies with equal employment responsibilities to eliminate excessive and duplicative requests to employees for information.

These recommended actions—and I give others in my written testimony—are by no means an exhaustive list of methods to improve the provision of services by the Federal equal employment program. If the above changes are implemented in the Federal system, many of the concerns raised by employer and civil rights groups alike will be favorably addressed.

In conclusion, the continued role of the Federal Government in equal employment opportunity enforcement is crucial if we are truly to fulfill the American ideals of equal opportunity and full democracy.

The problems which affirmative action was intended to remedy—prejudice and discrimination—are still very much with us, and so long as they remain, we see no reason to abandon what have, in effect, become workable mechanisms in achieving their elimination.

The private sector must be encouraged to institute voluntary affirmative action, recruitment, and training programs. The Federal sector should continue to monitor employers' activities, take action when warranted, as well as address the concerns of the business community without dismantling existing employment programs.

The best way to end the need to consider race, sex, or national origin in parceling out of opportunity, and the best way to end equality is to give all people the opportunities they need and have been denied too long.

A decade of remedial efforts is not enough to compensate for the generations of discrimination and deprivation. If we are to build upon the progress of the last few years, we must not abandon our goal of true equality and must strengthen the mechanisms we have to address our Nation's employment problems.

Thank you.

[The prepared statement of Ms. Estrada follows:]

TESTIMONY OF
CARMEN A. ESTRADA
DIRECTOR, EMPLOYMENT LITIGATION
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Affirmative action is an essential tool in the national effort to provide true employment and educational opportunity for members of groups to whom it has been denied in the past.

We oppose any weakening of our national commitment to equal opportunities for minorities and women. The federal government should not diminish its current efforts to promote equal employment opportunity and affirmative action in the public and private sectors. We urge the continuation of existing federal agency enforcement of equal employment laws and will make specific recommendations to increase this effectiveness.

I. Role of the Federal Government in Eliminating Barriers to Equal Employment Opportunity

Employment discrimination has been one of MALDEF's preeminent concerns ever since our founding. We found employment discrimination against Mexican Americans and other Hispanics to be pervasive when we took our first institutional look at the state of the nation in 1968, and I am sorry to report that it remains pervasive today. The economic plight of Mexican Americans is severe. As of March, 1979, the unemployment rate for Hispanics was 8.7%, compared to 6.1% for the general population. For Hispanic youths, the rate was 17.2%, compared to 12.5% for white youths. In 1978, the median earnings figure for non-Hispanic males was $12,300; for Hispanic males it was $8,900; for females, the figures were $4,700 for Hispanics and $5,300 for others. Sadly, even today over 20% of all Mexican Americans continue to live below the poverty level. These dramatic disparities reflect the discriminatory past and demonstrate a pressing need for corrective action.

While these statistics are indicative of a continuing critical inequality in employment opportunities open to Hispanics, and while overall conditions remain extremely difficult, we believe that some improvement has occurred since 1968. In particular, doors have opened for the few most enterprising, talented, or energetic individuals: a growing minority of Hispanics "make it" into the higher echelons of the employment system while the great majority trails far behind. This limited degree of progress is due in no small part to the federal government's support and enforcement of laws and regulations designed to eliminate employment discrimination against minorities. That support and enforcement effort has not always been as aggressive or as efficacious as we would have liked. But it has been the consistent policy of every Administration and every Congress for two decades, and on the whole the quality of the effort, the demands made by the government for equality, have been steadily strengthened. Republican Administrations, while unenthusiastic about other civil rights issues like school desegregation, have promoted equal employment opportunity on their conservative belief in the right and obligation of all persons to work according to their abilities.

Federal assistance in the eradication of the conditions and effects of slavery, discrimination and segregation has made the achievement of constitutional promises of equality a reality. [3] The Federal Civil Rights laws and enforcement machinery have sought to eliminate the vestiges of past discrimination and in providing opportunities for social, economic, and political power formerly available to but a privileged few.[4/] The federal government's role in achieving equality of opportunity for all Americans is vital and the current Administration's proposed revision of that role, through budget cuts affecting civil rights enforcement programs and regulatory revision, will jeopardize recent efforts to improve federal civil rights enforcement activity. [5/]

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[3] See U.S. Commission on Civil Rights, Civil Rights: A National Not a Special Interest (1981), Chapter 1, "From Slavery to Brown" attached hereto as Exhibit C.

II. Perspectives On the Contract Compliance Program

The contract compliance program under Executive Order 11246 [6/] has for fifteen years been a centerpiece of the federal enforcement effort. Like the government's litigation under Title VII [7/] and its activities through the Equal Employment Opportunity Commission, the contract compliance program, while imperfect and frustratingly slow in approaching its noble goals of eliminating employment discrimination, has on the whole been sincerely and positively dedicated to achieving its purpose. Until recently, no Administration and no Congress had seriously entertained proposals to make civil rights enforcement less effective or the continuation of employment discri-

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[4/] See, Id., Chapter 2, "From Legal Equality to Legal Opportunity", attached hereto as Exhibit C.

[5/] See, Id., Chapter 3, "The Federal Civil Rights Enforcement Effort", attached hereto as Exhibit C.

[6/] Executive Order 11246, 30 Fed. Reg. 12319 (September 24, 1965), as amended by E.D. 11,375, 32 Fed. Reg. 14303 (October 13, 1967), and by Executive Order 12,086, 43 Fed. Reg. 46501 (October 8, 1978).

[7/] Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq*.

mination easier. In its enforcement program under Executive Order 11246, the government always tried, usually with at least some measure of success, to be part of the solution and not part of the problem.

This consistent bipartisan commitment to eliminating employment discrimination has recently come under attack in both the Congress and the Executive Branch. We are deeply troubled, and feel gravely threatened, by indications that the federal government may dilute or destroy the effectiveness of the contract compliance program in the guise of -- or perhaps as an incidental consequence of -- regulatory reform designed to reduce paperwork and restore business prerogatives. We are alarmed both by the real impact that such a retreat would have on Hispanic job opportunities and by the broader psychological damage that would be dealt to the dream of racial equality by regressive actions of great symbolic importance.

I am therefore here today to urge the Committee and the Senate to resist pressures to undermine the contract compliance program. By all means, simplify, streamline, reduce paperwork and bureaucracy -- but not in ways that cut at the heart of the contract compliance program's vitality.

How effective have Executive Order 11246 and its enforcement been? Has the program substantially approached its goals? Have its cost and burden been disproportionate to its effectiveness?

These are critical questions that cannot be answered simply. But a consideration of the historical and present circumstances of the contract compliance program suggests some elements of the answer.

First, this is not a long-established, well-functioning regulatory program that has had time to create a framework in which to function and to build a record of unqualified success. Although the antecedents of Executive Order 11246 date back to World War II, [8] prior to 1965 all programs were basically voluntary. No serious effort was made to enforce mandatory provisions of Executive Order 11246 until the 1970's. Affirmative remedies, more than simply asking discriminatory employers to change their ways -- including adoption of goals and timetables for increasing minority employment, [9] contract debarment proceedings, [10] and monetary compensation for victims of discrimination [11]-- were utilized only in extremely rare cases prior to the last few years. The present centralized enforcement structure has been in place only three years. [12] So slender is the government's actual experience in enforcing Executive Order 11246 that most substantive principles governing definition of impermissible discriminatory practices and proper remedies are borrowed from judicial decisions interpreting Title VII. This is not a program that has been tried and failed but one that has been only recently and partially implemented, and has just begun to achieve some results.

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[8] The first contract compliance program was established by President Roosevelt with the promulgation of Executive Order 8802, 6 Fed. Reg. 3109 (June 25, 1941); it prohibited discrimination on the basis of "race, creed, color or national origin" by federal defense contractors, and established the Fair Employment Practices Commission (FEPC) to monitor compliance. Subsequent Executive Orders which expanded the scope or remedies of the program were issued by President Roosevelt, E.O. 9346, 8 Fed. Reg. 7183 (May 27, 1943) (covering federal agenices and unions and giving FEPC added enforcement authority); President Truman , E.O. 9664, 10 Fed. Reg. 15301 (December, 1945)(extending FEPC beyond wartime) and E.O. 10210, 16 Fed. Reg. 1049 (February 2, 1951) and E.C. 10308, Fed. Reg. 12303 (establishing committee to monitor defense contractor compliance); President Eisenhower, E.O. 10479, 18 Fed. Reg. 4899 (August 13, 1953) and E.O. 10557, 19 Fed. Reg. 5655 (September 13, 1954) (creating Government Contract Committee and recognizing right to equal employment opportunity); and President Kennedy, E.O. 10925, 26 Fed. Reg. 1977 (March 6, 1961)(establishing President's Committee on Equal Employment Opportunity comprised of leading corporate, union, and public officials, and directing contractors to take "affirmative action" to achieve equal employment opportunity).

[9] Goals and timetables were first generally required of federal contractors in 1970 pursuant to "Revised Order No. 4", 41 C.F.R. Section 60-2. This Order was not effectively implemented until several years later.

Second, the program has continuously evolved from reliance on voluntary cooperation by federal contractors, which has always proved at best ineffectual and at worst a sham, to a specific mandatory compliance program with a credible threat of sanctions that are actually imposed. As long ago as 1945, the first wartime FEPC found out that without adequate enforcement sanctions the contract compliance program could not persuade discriminatory employers to change their ways. [13] In 1969, Arthur Fletcher, Assistant Secretary of Labor in the Nixon Administration, candidly stated that "voluntarism" is not enough and called for emphasis on results. [14] Ten years ago, Congress reviewed the 30-year history of the contract compliance program in its debate over the 1972 Amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq*. It concluded that the program had not been successful [15] and attributed its lack of success to the inadequacy of sanctions and remedies available under the earlier Executive Orders or of those actually utilized under E.O. 11246. [16] A 1975 study of the contract compliance effort by the General Accounting Office also noted and criticized the futile reliance on methods of persuasion and conciliation unsupported by sanctions. [17] These observations confirm what common sense and practical experience tell us: in a time of fierce competition for limited employment opportunities and in a time of strong resistance to aggressive minority efforts for enhanced economic status, a toothless compliance program will not succeed.

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[10] In the first ten years of the E.O. 11246 enforcement program, only one order of debarment from federal contracts was apparently issued. Indeed, in the early 1970's all lawyers, public and corporate officials knowledgeable about the contract compliance program were aware that debarment was not a realistic possibility in any case.

[11] Back pay was never sought as part of the sanction for discrimination by contractors until the mid-1970's, and even recently awards have been few and, for the most part, small.

[12] Executive Order 12086 (October 8, 1978) consolidated all enforcement activities from different agencies into the Department of Labor, giving the Office of Contract Compliance Programs full authority for all contractors. Prior to 1978, the effectiveness of enforcement varied widely from industry, depending on which agency had enforcement responsibility. Most agencies, and therefore most industries, did not have a vigorous compliance effort. Since 1978, OFCCP's centralized direction has for the first time given the entire program consistent, relatively diligent enforcement.

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[13] Herbert Hill, *Black Labor and the Amrican System* (Washington, D.C.: BNA, 1977), pp. 173-174.

[14] BNA Daily Labor Report, August 25, 1969, p. E-2.

[15] S. Rep. No. 92-415 92nd Cong. 1st Sess. (1971), p. 31; H.R. Rep. No. 92-238, 92nd Cong. 1st Sess. (1971) p. 15.

[16] S. Rep. No. 92-415, *supra*, H.R. Rep. No. 92-238, *supra*, p. 16.

[17] General Accounting Office, *The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved 1975*.

Third, only in recent years has enforcement of E.O. 11246 been effectively coordinated with other federal efforts to promote equal employment opportunity. The major legislation in this area, Title VII, was amended in 1972; during the consideration of the Title VII Amendments Congress reaffirmed its approval of an independent but coordinated contract compliance program consistent with Title VII, including the enforcement mechanism contained in Revised Order No. 4 and the debarment sanction. [18] In 1978, Executive Order 12067, 43 Fed. Reg. 12985 (June 30, 1978) gave the Equal Employment Opportunity Commission (EEOC) responsibility for "leadership and coordination" of all federal EEO programs including the contract compliance program, and specifically ordered consultation between EEOC and other agencies (including OFCCP) to develop uniform enforcement programs with respect to substantive standards, procedures for investigation and compliance, and record-keeping and reporting functions. [19] The Uniform Guidelines on Employee Selection Procedures, 29C.F.R. 1607.1 et seq. (1978) provide a dramatic example of this recent impetus to uniformity. By adopting those Guidelines all the major federal enforcement agencies agreed on a single detailed set of technical and regulatory criteria for use of tests and other selection devices for covered employers. [20] EEOC and OFCCP also concluded in January, 1981, an interagency Memorandum of Understanding "designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency". [21] Thus, serious measures have recently been taken to alleviate problems caused in earlier years by separate development of parallel programs in different agencies.

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[18] See, Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319, 1329-30 n. 14 (9th Cir. 1979), cert. denied 445 U.S. 946 (1980); and Section 718 of Title VII, 42 U.S.C. 2000e-17 (1972)

[19] Executive Order 12067, Sections 1-201, 1-301, 1-304.

III. Contract Compliance Program Improvement

Significant coordination has been achieved in the policies, procedures and operations of the two federal agencies with major compliance programs affecting private employers, the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs. [22] As a result, many areas of inconsistency and duplication will be eliminated, and costs to employers and the federal government should be reduced substantially. The interagency MOU discussed above, should eliminate duplicative investigations and compliance reviews, substantially reduce paperwork and other costs for private employers, and improve procedures for processing individual complaints. The Memorandum provides for sharing of data, including documentation of investigative findings, and sets out procedures for joint targeting and coordination of enforcement actions. The MOU also establishes ongoing mechanisms, in Washington and in the field, to develop additional information-sharing policies and procedures which will assure consistency in data analyses and definitions of discrimination; establish further procedures for collecting, sharing and analyzing information, joint training of staff, and other actions, to assure that both agencies apply similar standards and make most efficient use of their resources.

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[20] The discrepancy between the EEOC's earlier Guidelines on Employee Selection Procedures, 29 C.F.R. Section 1607 (1970), and the quite different standards applied by OFCCP under its Federal Enforcement Agencies Guidelines on Employee Selection Procedures 29 C.F.R. (1976) had been a major source of criticism by employers subject to investigation and compliance proceedings by both EEOC and OFCCP.

[21] 46 FR 7435, January 23, 1981.

[22] See, Equal Employment Opportunity Commission, Coordination of Federal Equal Employment Opportunity Programs, September, 1981 for a discussion of current and proposed coordination efforts of federal programs.

These interagency coordination activities are the result of recent efforts to streamline federal equal employment opportunity programs and address the concerns of employers while improving service to protected groups. This coordination process is long overdue and will greatly enhance the federal government's equal employment activities.

Moreover, a recent General Accounting Office review of the Contract Compliance Program[23/] discusses problems in the program and outlines steps which have been taken to address the program's weaknesses. The GAO report concludes that the OFCCP has made significant progress in resolving difficulties which arose subsequent to the consolidation of the contract compliance program in 1978. The OFCCP's efforts to improve performance are ongoing and proposal to diminish this important program must be rejected until the full promise of the program is realized.

[23/] See General Accounting Office, The Administration of the Contract Compliance Program has Shown Improvement, October 9, 1981, attached hereto as Exhibit D.

IV. Future Federal Agency Action

The Office of Interagency Coordination recently conducted employer and federal agency surveys to identify major problems in federal equal employment programs. The major problems identified by the surveys include the following:

- Duplicative investigations and inconsistent investigation procedures create major paperwork burdens, are costly for employers and the federal government and provide little benefit for protected classes.
- Inconsistent and confusing interpretations of standards and regulations.

Any serious attempt to improve the federal role in increasing employment opportunities for women and minorities must address these problems head-on. Rather than dismantling existing federal employment programs and allow employers' voluntary affirmative action efforts to determine the pace of our nation's equal opportunity efforts -- a review and revision of federal agency action in this area, designed to improve agency efforts, should be the major focus of the current Administration.

Among those actions which would improve current federal agency activities are the following:

- Administration recently established uniform federal policy on collecting applicant data.
- Continued efforts to coordinate the various federal sector equal employment programs including coordination; to insure consistency of federal affirmative action requirements for affirmative aciton programs; of revisions of EEOC regulations on collection of minority data.

- Coordination and review of federal agency equal employment issuances to eliminate inconsistencies and to develop regulations and interpretations which clearly and properly define equal requirements.
- Development of standardized complaint processing procedures, to the extend feasible under law, to standardize requirements for timely filing and complaints, for formats and contents of complaints, criteria for dismissal of complaints and other complaint processing procedures.
- Development of expanded, systematic information - sharing between agencies with equal employment responsibilities to eliminate excessive and duplicative requests to employers for information.
- Development of a uniform, government-wide record-keeping requirement to eliminate conflicting and inconsistent requirements regarding format of records to be maintained and time periods for retaining records.
- Conduct formal staff training sessions to provide consistent, government-wide training, in skills areas such as interviewing, investigating, negotiating and the effective administration of legal requirements.
- Development of uniform definitions, standards, and procedures for affirmative action programs under different legal authorities.

The above recommended actions are by no means an exhaustive listing of methods to improve the provision of services by the federal equal employment programs. If the above changes are implemented in the federal system, many of the concerns raised by employer and civil rights groups alike will be favorably addressed.

V. Proposals to Alter Current Equal Employment Policies

Recent legislative and administrative proposals seek to greatly alter equal employment opportunity laws and affirmative action policies. These proposals would not in any way increase employment opportunities for women and minorities. Rather, the proposed changes, if implemented, would have a disastrous impact on current federal and private enforcement of equal employment laws.

Among the proposals are the following:

-- Senator Orrin Hatch's S.J. Res. 41, a Constitutional amendment barring the enactment or enforcement of any laws which make distinctions on account of race, color, or national origin and prohibiting the use of any numerical objectives which make such distinctions.

-- Congressman Robert Walker's H.R. 3466, amending the Civil Rights Act of 1964 to prohibit federal rules requiring employers to hire workers or schools to admit students on the basis of race, sex or national origin; and to bar the use of quotas, goals or timetables.

-- Congressman Paul McCloskey's proposal to revise Executive Order 11246 governing the federal contract compliance program so as to reduce drastically the reporting requirements for contractors, severely limiting the authority to impose sanctions, and stripping the Secretary of Labor's discretion to issue rules and regulations or to establish thresholds and reporting procedures.

-- The Department of Labor's proposed revisions of OFCCP regulations[24] which would, among other things, reduce the number of contractors affected by raising thresholds for basic coverage and for submission of affirmative action plans, redefine the concept of underutilization, eliminate pre-award reviews, and lower standards regarding sex discrimination.

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[24] 41 CFR Part 60

-- The Civil Rights Division of the Department of Justice has announced that the Division will seek goals only as to recruitment, with a provision that those who are recruited shall be treated fairly.

-- The "Wednesday Group" proposal which centralized the enforcement of many employment laws in the Department of Justice and adopts an 'intent' standard for discrimination proof.

These proposals will, in effect, eliminate or greatly minimize current equal employment and affirmative action efforts in the public and private sectors. MALDEF has specifically addressed the continuing need to utilize goals and timetables, statistical measures of compliance, and voluntary affirmative action programs in previous testimony before the House Education and Labor Subcommittee on Employment Opportunities.[25] We maintain our position that :

-- Continued use of numerical goals and timetables is necessary, for without such specific requirements, affirmative action efforts are a sham and useless for enforcement purposes.

-- The "effects test" articulated by the United States Supreme Court in Griggs v. Duke Power Co.,[26] and related statistical measures of compliance with federal nondiscrimination provisions that must remain the cornerstone of federal civil rights enforcement efforts.

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[25] See Exhibit B, p. 15 et seq. attached hereto.

[26] 401 U.S. 424 (1971); "Effects test" is reiterated in subsequent Supreme Court Opinions, e.g., Dothard v. Rawlinson, 422 U.S. 321 (1977); Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)

-- Voluntary affirmative action programs must be allowed to continue and should not be hindered by laws prohibiting the consideration of race, sex or national origin.

-- Increased recruitment of minorities and women must not be the sole affirmative effort which employers are allowed to engage in -- a recruitment goal, without more, only ensures that protected groups get applications not that they get jobs.

I am deeply troubled by the proposed policies and regulatory changes relating to affirmative aciton and equal employment opportunity enforcement. We believe there is a continued need for aggressive affirmative action efforts to ensure that minorities and women are accorded equal treatment in our society. Current proposals do not achieve this goal, rather, they dismantle existing programs and procedures designed to make equal employment a reality and put in their place a so-called "color-blind" system which will abruptly alter the national pattern of integration of our work force which we have experienced in the last two decades.

VI. Conclusion

The Continued role of the federal government in equal employment opportunity enforcement is crucial if we are truly to fulfill the American ideals of equal opportunity and full democracy. The problems which affirmative action was intended to remedy -- prejudice and discrimination -- are still very much with us, and so long as they remain, we see no reason to abandon what have, in effect, become workable mechanisms in achieving their elimination.

The private sector must be encouraged to institute voluntary affirmative action, recuitment and training programs. The federal sector should continue to monitor employers' activities, take action when warranted, and address the concerns of the business community without dismantling existing equal employment programs.

The best way to end the need to consider race, sex or national origin in the parcelling out of opportunities and the best way to end inequality is to give all people the opportunities they need and have been denied too long. A decade of remedial efforts is not enough to compensate for generations of discrimination and deprivation. If we are to build upon the progress of the last few years, we must not abandon our goal of true equality and must strengthen the mechanisms we have to address our nation's employment problems.

Thank you for this opportunity to testify on this important issue. I will be happy to respond to any questions you may have.

The CHAIRMAN. Thank you.

Ms. Piercy, other than more enforcement of the Office of Federal Contract Compliance Programs, what other suggestions do you have for improving employment opportunities for women and minorities?

Ms. PIERCY. Perhaps I should just start by saying I understand that these hearings are to look at solutions to affirmative action problems. Part of the reason that we come back again and again to the enforcement mechanism is that this very administration right now, every day, is dismantling those mechanisms which exist and is ending the enforcement programs, even as we have heard this morning that many people on many sides of this issue feel that enforcement should exist. That is the fundamental first and bottom line.

The CHAIRMAN. Could I interrupt you on that point? We have had a lot of testimony too, both here and in the Judiciary Committee, that the system has not been working, that it has been oppressive, and that it is time consuming and costly, concerned more with paperwork than with results; that women are not getting jobs, and minorities are not getting jobs; and it really is not in some respects the fault of the business community. In fact, we have had very little actual evidence of what the Supreme Court would call invidious discrimination, although I think all discrimination is invidious.

Ms. PIERCY. I would like to suggest, Senator, that in our office we have many, many cases every day of invidious discrimination.

The CHAIRMAN. I believe that, but what I am trying to say is that there is a lot of complaining that the system is not working. Frankly, the bulk of the testimony in front of this committee has been that the system is not working well, that it really is not accomplishing what should be accomplishing, and that most of the gains—even the representative of the NAACP 2 days ago testified that the bulk of the gains have really come as a result of the enactment of the Civil Rights Act of 1964.

Ms. PIERCY. Then I guess I am delighted I had the opportunity to testify this morning. My full testimony indicates that over the last 4 years, indeed, we have finally put into place an enforcement mechanism that was starting to work, that in fact was bringing about those very kinds of gains.

What we have seen in the last 6 months is a deliberate dismantling, not even just in terms of the consideration of new regulations, but in terms of the very enforcement process of what is going on right now.

I would also like to point out that I know there is a lot of discussion about employers saying that the Government is being an adversary in this situation and what we really need is to get rid of this adversary posture.

The CHAIRMAN. I do not believe that is what they are saying. They are not saying that they resent the Government being in an adversary posture. They say they resent the Government ineffectively oppressing them with paperwork demands and paper chases that really do not help provide jobs.

We have just had business after business, small business, women in small business, women owners of small business, and others come in here and say that it is the Government that is deterring through these—and some have called them—vicious programs: "To me personally, they are deterring the actual help to women and minorities in getting job opportunities." I think the truth probably lies somewhere in the middle.

Ms. PIERCY. The current Director of the OFCCP Ellen Shong did indeed say to Women Employed in a meeting that the real problem right now was this adversarial relationship.

I would like to point out for the record that from our point of view, when women and minorities document cases of discrimination and an employer says that no discrimination exists, there is going to be an adversarial relationship there, because there is one point on one side and another point on the other side, and we are going to have to have legal proceedings in order to settle that kind of a case.

The CHAIRMAN. Then should not they go to the EEOC, where those adversarial relations are really made in law, rather than have OFCCP——

Ms. PIERCY. But there is no systemic program, nor any provisions for affirmative action, nor any provisions for the use of the Federal contractor mechanism to bring about equal opportunity in this country.

I would suggest that that is the purpose of the Office of Federal Contract Compliance Programs—to enforce Executive Order 11246, as amended, to provide for equal opportunity for all employees and to provide that Federal contractors must indeed practice that equal opportunity.

The CHAIRMAN. Is it fair to say then that you support the present system of goals, timetables, and quotas?

Ms. PIERCY. It is absolutely fair to say that we support the enforcement mechanisms and in particular the regulatory proposals that had been duly published under the Administrative Procedures Act in 1979 and were to go into effect in 1981, and which the Reagan administration in total unprecedented action withdrew and instead now is proposing regulations to dismantle equal opportunity and affirmative action requirements altogether.

The CHAIRMAN. Well, I have not interpreted it that way, but you certainly have every right.

Ms. Estrada, a common complaint from members of the business community is that EEOC is the proper congressionally sanctioned agency for redressing past acts of discrimination. What objections would you have in having the EEOC be the exclusive agency for seeking retroactive relief—that is, backpay relief—and leaving the OFCCP with the responsibility of obtaining prospective employment opportunity gains from contractors?

Ms. ESTRADA. The EEOC's current activities are indeed very important, as you indicate, dealing with backpay and acting as either an individual or class body of relief. At the same time, I would think that other mechanisms are equally important. The scope of my testimony was an attempt to give recommendations as to how to improve the OFCCP.

I would not agree that the OFCCP should be limited to only looking forward. It should indeed look forward, but where the facts allow and require, it should also give backpay relief when necessary.

I believe that the OFCCP perhaps needs a lot of review, more interagency coordination, and a considerable amount of streamlining, but I would not think that the backpay element should be eliminated.

The CHAIRMAN. OK. Thank you both for coming. We appreciate having your testimony. Certainly your full statements will be made a part of the record.

Our last panel today will consist of three individuals: Elmo Sanders, vice president of personnel, Varian Associates, American Electronics Association, Palo Alto, Calif.; Lawrence Lorber, representing the American Society for Personnel Administration, Washington, D.C.—Mr. Lorber is a labor lawyer in Washington, D.C. and former Director of OFCCP—and Dr. Bernice Sandler of the American Jewish Committee, also in Washington, D.C.

We are happy to welcome all three of you today. We will begin with you, Mr. Sanders.

STATEMENT OF ELMO SANDERS, VICE PRESIDENT OF PERSONNEL, VARIAN ASSOCIATES, AMERICAN ELECTRONICS ASSOCIATION, PALO ALTO, CALIF., ACCOMPANIED BY GERRY ORIANO, CORPORATE MANAGER, AFFIRMATIVE ACTION PROGRAMS

Mr. SANDERS. Thank you, Mr. Chairman, for giving us this opportunity to speak to you today.

I am vice president of personnel for Varian Associates in Palo Alto, Calif. With me is Gerry Oriano, our corporate manager of affirmative action programs. We are here today representing the American Electronics Association, of which Varian is a member.

The American Electronics Association—AEA—is a national trade association representing 1,800 companies in the electronics industry in 43 States. Many of these companies are small but fast growing. For example, 72 percent of our member companies employ fewer than 250 people, 40 percent employ fewer than 100 people, and only 22 percent have more than 1,000 employees. Nonetheless, these companies provide jobs for more than a million Americans.

AEA's members manufacture aerospace equipment and supplies, computers, and their peripheral equipment, semiconductors, communication systems, consumer electronics products, instruments, and military equipment and defense systems.

The AEA and its member companies continue to be committed to the principles of equal opportunity and the process of affirmative action. We are devoting considerable resource to propose more effective approaches to be used by Government agencies to promote equal opportunity and affirmative action.

We have also worked closely with minority, disabled, and women's groups to assist in developing consensus on effective and efficient enforcement programs and techniques.

Our commitment on affirmative action is based on the belief that the electronics industry will continue to be a labor intensive and growth oriented industry with an increasing need for human resources. Equal opportunity, therefore, is a goal we pursue not only out of our social conscience but because it makes good business sense.

It is in our self-interest to seek out, train, and employ talented people of all races and both sexes. The rapid growth of the electronics industry faces us in the forefront of employment, which means we need minorities, handicapped individuals, and women in record numbers in order to sustain this growth.

For the past 3 years an AEA committee has been working on practical and constructive ways to improve and refine methods for implementing this Nation's commitment to equal opportunity and to affirmative action.

We offer the committee the following suggestions for your consideration:

No. 1, the institution of a simple annual test for OFCCP to measure compliance of all Federal contractors with 100 employees or more. The test would be based on a statistical measurement of the effective utilization of minorities and women by EEO-1 categories.

We believe that such a compliance test, easy to compile and make available, could be run through an OFCCP computer to determine comparability with similar industry and area job groups. Those contractors which fall dramatically short would be targeted for review.

No. 2, the transfer of all individual, systemic, and class discrimination matters under Federal law to the EEOC, while continuing the OFCCP responsibility for Federal contractor affirmative action.

OFCCP sanctions should be prospective in nature, since their purpose is to bring about a fully integrated workforce. Backpay and other retrospective sanctions properly belong within the province of the courts and EEOC and not, in our opinion, with OFCCP. This delineation of responsibility will avoid unnecessary confusion and duplication of effort.

No. 3, good faith negotiation and conciliation efforts, leading to fulfillment of contractor obligations, should be used by contractors unable to meet the statistical compliance. Debarment should be used only as a last resort in cases where essentially no chance for successful negotiation remains.

Good faith efforts would be the paramount factor in determining what obligations, if any, the contractor needs to assume. These efforts could include the establishment of formal training programs, specific programs to use available educational resources, and definitive contractor plans to bring minority and women employees into the work force.

Several examples of these activities are programs funded jointly by industry and Government. And example is MESA, a program devoted to encouraging minority students to acquire the academic preparation necessary to enroll in university engineering or related programs as well as providing career exploration activities in mathematics and science-related professions.

Another example is Peninsula Academies, an industry/school system partnership that prepares high school students for entry level electronic and computer technology positions upon graduation.

A third is INSTEP, a program supported by the electronics industry, that provides to ill-prepared students the opportunity to receive 6 months of hands-on training on computer and electronic equipment operation.

Last, No. 4, is the orientation of OFCCP personnel to be redirected toward technical assistance, education, and consultative functions.

In the past, OFCCP's preoccupation with statistical analysis and faultfinding has diverted their attention away from the basic purpose of the program, which is to cure the root causes that have made affirmative action so necessary.

We applaud OFCCP Director Shong's efforts to set up industry advisory groups. This is a positive step toward our goal. OFCCP must also establish close relationships with training and educational institutions in order to assist contractors, particularly small ones, in achieving positive results.

We believe that implementation of these principles will allow contractors to focus their energies on the critical affirmative action factors of education and skill development, which in turn will result in expanded employment opportunities for minorities and women.

Thank you, Mr. Chairman, for giving us this opportunity to share our thoughts with the committee. We would be happy to answer any questions.

The CHAIRMAN. Thank you so much.

Mr. Lorber.

STATEMENT OF LAWRENCE LORBER, AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, WASHINGTON, D.C., ACCOMPANIED BY JOHN BLODGER, CHAIR, EEO COMMITTEE

Mr. LORBER. Mr. Chairman, my name is Lawrence Lorber. I am appearing before you today on behalf of the American Society for Personnel Administration. I am accompanied by Mr. John Blodger. Mr. Blodger is currently the chair of the EEO Committee of ASPA. He is a past president of ASPA and is currently group director of compensation and benefits for the Bendix Corp., Aerospace, and Electronics Group.

ASPA members are involved in all aspects of personnel policy, including the development and implementation of employers' equal employment and affirmative action programs. Thus, the background and membership composition of ASPA gives it a unique perspective on the real functioning and possibilities of affirmative action.

My own background might be of some assistance as well. Prior to joining my law firm I held various positions in Government, including that of Director of the Office of Federal Contract Compliance Programs in the Ford administration. During that tenure the regulatory reform effort at the OFCCP was commenced.

On January 29, 1981, in his first press conference President Reagan set forth in rather clear language his views on equal opportunity—and I would like to quote him—"This administration is going to be dedicated to equality. I think we've made great progress in the civil rights field. I think there are some things, however, that may not be as useful as they once were, or that may even be distorted in the practice. Such as some affirmative action programs becoming quota systems."

This statement of the President's belief sets the agenda for ASPA's testimony today and we hope for the continuing review of our entire equal employment structure.

To move to the basic premises of the hearing what aspects of the program should be corrected and what aspects should be reviewed, we would note initially that the whole debate over the Office of Federal Contract Compliance and affirmative action has raged more often than not, not over the concept, but over rather transient or *ad hoc* bureaucratic methods which have been developed to meet immediate problems.

The basic regulatory framework for the contract compliance program has developed during the tenure of four Presidents and seven Secretaries of Labor. Each succeeding administration left its own mark on the system but did very little to mold the system into a cohesive structure. We believe it is certainly beyond time when this situation needs correction.

We understand that the current Executive order, which includes both an affirmative action and a nondiscrimination component, does not substantively go beyond title 7. That is, the affirmative action obligations do not create a higher standard for Government contractors but rather requires of them extra efforts to reach the statutory goal of nondiscrimination. While this view has been upheld by several circuit courts, it unfortunately has not been upheld by the agency certainly during the last administration.

Thus, we believe the first reform necessary to bring a sense of reason to the program would be a formal statement expressed in regulation that the OFCCP is bound by substantive title 7 precedent. The current Labor Department administration has indicated that it would move toward this position, but we hope that the committee will encourage it to do so formally.

We reach, I think rather quickly, one of the critical elements of the program. That is, if indeed it is even coequal with title 7, should the program deal with remedial relief, or should it deal with questions of discrimination?

While the sparse case law on this issue seems to indicate that the current Executive order does contemplate discrimination reviews, it must be understood that the issue has not been fully developed and there is a significant body of legal scholarship which argues forcefully that the opposite result holds. However, our concerns here today do not fall in the legal area. That debate will go on in the courts with great uncertainty for employers until the issue is solved. We believe that the issue is a policy one and not a legal one.

First, however, and most obviously, the accommodation must be made between the EEOC and the OFCCP. As long as both agencies remain with their current missions, it is an impermissible waste of limited and diminishing resources for both to deal with the same employers or attempt to override the other's settlements.

Unique in Government where two agencies have overlapping jurisdiction, the OFCCP and the EEOC have never formally agreed to a division of responsibility. In 1975 and 1976, while I had responsibility, the Labor Department constantly attempted to get the

EEOC to agree to a full faith and credit agreement. That is, each agency would agree to give full faith and credit to the other's settlements. This would have helped to stop the competition between the two. Unfortunately, the EEOC would not then agree.

Second, the OFCCP simply has no business dealing with individual complaints. Its stated mission is to insure that Government contractors have the largest labor pool possible. Individual discrimination complaints have no role in this and serve to tie up the agency's resources.

The administrative procedures at the OFCCP are so cumbersome because of the procurement aspects that an individual will have years to wait before his or her case is heard. Contrast this to the EEOC's rapid chart processing system and the ability of that agency to issue individual right-to-sue letters.

Finally with respect to systemic or class-type issues, we would urge that the EEOC and the OFCCP, where possible, delegate that function to the EEOC, which has the means and the staff to deal with it.

While these steps would go a long way toward alleviating the backpay problems, we believe a more serious review of the policy implications must be taken. In our view, the OFCCP wastes its resources and loses sight of its primary mission by focusing on remedial activity.

We believe therefore, that there are two ways in which the agency could deal with the problem and achieve its mission. The first and most obvious would be the issuance of a new Executive order. While the Labor Department is engaged in a serious and long-overdue review of its regulations, my own experience in this area is that such reviews and regulatory changes take an exceedingly long time and result in half measures and compromises. Hopefully the current administration will avoid these pitfalls.

However, we believe that the time is past for a new Executive order. The current one is 16 years old. We believe it still warrants serious consideration, and we believe a new order which clearly enunciates the administration's commitment to fairness should be welcome.

Should this prove infeasible, we would urge the committee, as it is currently reviewing the CETA regulations and the CETA legislation, to attempt to encompass within the job training programs a definition of "affirmative action." We believe in this way, in the job training area where affirmative action was originally directed to focus its attention, that affirmative action can be delivered, that the adversarial relationship between employers and the Government which does exist could be abated somewhat, and that employers and the population at large can be told with clarity what affirmative action means.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lorber follows:]

STATEMENT ON BEHALF OF THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION

Mr. Chairman, members of the Committee, my name is Lawrence Lorber. I am appearing before you today on behalf of the American Society for Personnel Administration (ASPA). I am accompanied by Mr. John Blodger. Mr. Blodger is currently Chair of the EEO Committee of ASPA. He is Group Director, Compensation & Benefits, the Bendix Corporation, Aerospace/Electronics Group.

The American Society for Personnel Administration is the world's largest association of personnel and industrial relations professionals representing nearly 34,000 practitioners in business, government, and education dedicated to the furtherance of personnel and industrial relations management. ASPA members are involved in all aspects of personnel policy including the development and implementation of employers' equal employment and affirmative action policies. The organization has long been involved with the Contract Compliance Program including the sponsorship of numerous continuing education seminars on various aspects of contract compliance as well as taking a leading role in establishing the climate which has enabled the broad consensus in favor of equal employment to become a fact in American life. Indeed, while ASPA members come from every level of business and government, and hold positions at every level within their organizations, ASPA represents the operating personnel practitioner of the small to medium size company or operating facility within a larger company. This background and membership composition gives ASPA a rather unique perspective on the real functioning and possibilities of affirmative action.

My own background might be of some assistance as well. I am currently a partner in the Washington office of Breed, Abbott & Morgan and represent employers in all aspects of equal employment including EEOC, OFCCP and affirmative action matters. Prior to my joining the law firm, I held various positions in government including that of Director of the Office of Federal Contract Compliance Programs in the Ford administration. During that tenure, the regulatory reform effort at the OFCCP was commenced. In addition, some of the major cases brought by the OFCCP were started during the 1975-1976 period. As a result, I hope I bring some perspective and understanding of the issues to you.

On January 29, 1981, at his first press conference, President Reagan set forth in clear language his views on equal opportunity:

> "This administration is going to be dedicated to equality. I think we've made great progress in the civil rights field. I think there are some things, however, that may not be as useful as they once were, or that may even be distorted in the practice. Such as some affirmative action programs becoming quota systems."

This opinion of the President sets the agenda for ASPA's testimony today, and we hope, for the continuing review of our whole equal employment structure.

It must be stated in the outset that our society is very different in 1981 than it was in 1964. We have certainly moved beyond the time when we would openly countenance deprivation of employment opportunities because of a person's race, or sex, or religion. We have witnessed an ever increasing integration of our workplace, to the benefit of the individuals who have moved into the mainstream of our economy, and to the greater benefit of our society which now can call upon the talents and abilities of all. This is not to say that the task is finished. Certainly in our heterogeneous society we must insure that rights newly gained are not lost. And, we must acknowledge that the gains we have experienced did not simply come about because of a natural evolution. Rather, it was because of the changing perceptions of our society as to what was just, and because of the responsiveness of our government to that change, in the enactment of the Civil Rights Act, and in the promulgation of the Exeuctive Order that we have moved as far as we have. In the course of that dynamic fifteen year period, affirmative action, in concept and in practice has played a critical role in moving us forward.

However, it would be irresponsible to assume that simply because we have made progress that a reassessment of the concept of affirmative action, and more importantly the regulatory structure which has grown over the last decade is not necessary. Indeed, because of the haphazard way in which the law has developed, with court decisions built upon regulatory and statutory developments so that the legal basis of equal opportunity is a mosaic of different and sometimes differing requirements, it is certainly appropriate for a thorough review. In almost every other area of regulatory concern, periodic review and reevaluation of the basic laws and requirements are built in to the systems. It is in the one area of equal employment that conscientious review is not welcomed, but rather viewed as an attack on the concept. In our view, this narrow mind set evidences a belief that the concept of equality cannot survive a new look. We adamantly reject this as unwarranted and dangerous. The ideal of equality is not so bankrupt as to be hidden away lest it will crumble upon close examination. Nor is our system so subject to the whims of small groups that a societal commitment to equality and fairness will be lost.

In reviewing the evolution of affirmative action, the distinction between the basic concept and the regulatory structure must be highlighted. One of the major problems with the subject is that affimative action has never been defined with any specificity. Too often the debate rages not over the concept but over transient or ad hoc bureaucratic methods which have been developed to meet immediate problems. Indeed the basic regulatory framework for the Contract Compliance Program has developed during the tenure of four Presidents and seven Secretaries of Labor. And each succeeding administration left its own mark on the system, but did very little to mold the system into a cohesive structure. It is certainly beyond the time when this situation needs correction.

The meaning of affirmative action in the equal employment context has been a source of confusion. It was brought into the picture first in 1960 when the committee headed by then Vice President Nixon recommended that additional obligations be considered for government contractors. In 1961, then President Kennedy issued Executive Order 10925 which placed a dual obligation on government contractors. It repeated the existing obligation that government contractors not discriminate. In addition, the Executive Order required the contractors to take affirmative action to make the non-discrimination policy effective. Executive Order 11246 repeated these requirements.

The first question we must address is what was the rational intent of the additional affirmative action obligation? The answer must be that the affirmative action obligation was intended to assure compliance with the non-discrimination requirement. While it obviously envisioned additional affirmative steps to assure that the government contractor's workforce was open to all qualified persons, the basic premise of affirmative action was as a supplement to and underpinning for the non-discrimination requirement. We believe this analysis is critical because it provides the only rational theory by which to understand the obligation. And, it explains why Executive Order 11246, which was issued after the passage of Title VII must be interpreted consistent with it.

If we understand that affirmative action is the means to assure compliance with the statutory scheme of non-discrimination, we understand why government contractors are given the extra obligation. The foundation for Executive Order 11246 lies not with Title VII, but with the statutory authority of the executive to procure goods and services for the government, the Federal Property and Administrative Services Act of 1949. That Act directs the President to procure goods and services in a manner "advantageous to the government in terms of economy, [and] efficiency." Indeed, judicial support for the affirmative action obligation leads directly to the procurement authority. Both the Eastern Contractors case (442 F.2d 159), which upheld the Philadelphia Plan, and the 1979 case in which the wage-price program was upheld, AFL-CIO v. Kahn ratified the Contract Compliance Program on the basis of the President's procurement authority.

This analysis leads us to the main focus of this series of hearings, that is, what is the appropriate role for affirmative action, and the Contract Compliance Program in the 1980's. It is our belief that there is a role for both, and that while the bureaucratic and regulatory excesses of the past need to be removed, they should not pull down the structure.

We note initially that viewing affirmative action as a derivative of the procurement authority and as a supplementary obligation to insure compliance with Title VII compels certain immediate conclusions. First, we understand that the current Executive Order, which includes both an affirmative action and a non-discrimination component does not substantively go beyond Title VII. That is, the affirmative action obligation does not create a higher standard, but rather requires extra efforts to reach the statutory goal of non-discrimination. In the 1972 congressional debate over the proposed transfer of OFCCP to the EEOC, Senator Williams noted:

> "The Department of Labor, the EEOC, and the Department of Justice all agree that the basic requirement of

> non-discrimination in government contracting, the so-called antidiscrimination provisions, are the same under Executive Order 11246, and Title VII of the Civil Rights Act."

(Legislative History of the Equal Employment Opportunity Act of 1972, at 921.)

This view has been upheld by the several Circuit Courts which have had occasion to review the issue. Unfortunately for the concept, and the program, that rather self-evident proposition was not accepted by the agency, at least during the last administration. By expending their limited resources on futile efforts to disregard clear judicial and legislative directives, the OFCCP attempted to assert the dubious principle that its authority ran beyond Title VII. Thus the first reform necessary to bring a sense of reason to the program would be a formal statement, expressed in regulation that the OFCCP is bound by substantive Title VII precedent. It should be noted that the Labor Department has indicated that it would move towards this position, hopefully this Committee will encourage it to do so.

In agreeing that Title VII sets the outer limits for the non-discrimination requirements of the Executive Order, we are quickly faced with one of the most difficult questions facing the program. That is, should it attempt to deal directly with questions of discrimination at all. If we answer this question positively, the issue of back pay, or equitable relief for persons who have suffered discrimination becomes paramount. In this issue we must deal with two questions -- what is legally required, and what makes sound policy. We know that the Congress consciously decided in 1964 and in 1972 to keep the OFCCP separate from the EEOC. Indeed, the Congress' clear intent was to have multiple forum for the redress of discrimination complaints. In our view serious consideration should be given to reviewing this situation as it serves to encourage litigation and forum shopping rather than the resolution of problems. Nevertheless, the Congress opted to go this route and allowed the OFCCP to remain independent. Second, it must be understood that the OFCCP has been in the back pay business for a long time. There are records of back pay conciliation agreements dating back prior to the passage of Title VII. Third, the sparse case law on this issue seems to indicate that the current Executive Order does contemplate discrimination reviews and appropriate remedies. In particular, the Duquense Power case in the Western District of Pennsylvania and in the Lee Way Motor case in the Tenth Circuit, the ability of a Judge to award back pay was favorably discussed. If back pay can, in fact, be awarded by a Judge in an Executive Order case, the agency would certainly not be precluded from attempting to conciliate a review on that basis.

It must be understood, however, that this issue has not been fully developed in a legal context. There is a significant body of legal scholarship which argues forcefully that the opposite result holds. Our concerns here do not, however, fall in the legal area. That debate will certainly go on for a long time with uncertainty for all parties until final resolution. We do believe that in the interim, certain measures can be taken so that this issue can recede in importance.

First, and most obvious, accommodation must be made between the EEOC and OFCCP on this issue. As long as both agencies remain with their current mission, and authority, it is an impermissible waste of limited, and diminishing resources for both to deal with the same employers, or worse, attempt to override the other's settlements. Unique in government where two agencies have overlapping jurisdiction, the OFCCP and the EEOC have never formally agreed to a division of responsibility. In 1975 and 1976, while I had responsibility, the Labor Department constantly attempted to get the EEOC to agree to a full faith and credit policy. That is, each agency would agree to give full faith and credit to the other's settlement. This would help to stop the competition between the two. Unfortunately, the EEOC then would not agree. Perhaps now, this policy can be reexplored. Certainly if the OFCCP adopts

Title VII principles, there should be no impediment to a quick agreement.

Second, the OFCCP simply has no business dealing with individual complaints. Its stated mission is to insure that government contractors have the largest labor pool possible. Individual discrimination complaints have no role in this and serve to tie up the agency's resources. Further, the administrative procedures at the OFCCP are so cumbersome because of the procurement aspects, that an individual will have years to wait before his or her case is heard. Contrast this to the EEOC's rapid charge processing system, and its authority to issue right to sue letters so that the individual complainant can pursue his or her own remedies. We therefore urge that the OFCCP stop considering any individual complaints and direct all such complainants to the EEOC. Further, any individual complaints discovered during a compliance review should be immediately sent to the EEOC. This could end the fishing expedition nature of the reviews.

Finally, with respect to systemic or class type issues, we would urge that consistent with the EEOC-OFCCP division of responsibility, the OFCCP, where possible, forward its reviews to the EEOC for processing. Again, the clouded issue of OFCCP authority should not hold up the pursuit of legitimate cases. Where this is not done, we would urge that the two agencies, perhaps through the Solicitor and the General Counsel set up a case review system so that uniformity in approach and targeting can be achieved. While this system is somewhat in place now, it has not worked.

These steps would go a long way towards alleviating the back pay problem. However, more serious review of the policy implication must be undertaken. In our view, the OFCCP wastes its resources, and loses sight of its primary mission by focusing on remedial activity. When an employer understands that a compliance officer can commence an extensive legal proceeding, it will obviously be loath to cooperate with the agency on the affirmative action program. Therefore the policy issue of remedial review is of critical interest. In our view, it has become one of the greatest impediments to effective and fair affirmative action progress. We would therefore urge reconsideration of the program and the Executive Order itself. As Senator Saxbe stated in 1972 when he argued for the retention of the OFCCP as an independent agency:

> "The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfurl on a limited and expensive case by case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required."

There would seem to be two ways to achieve the formal redirection of the program. The first and most obvious would be the issuance of a new Executive Order. While the Labor Department is engaged in a serious and long overdue review of the regulations, my own experience in this area is that such reviews and regulatory changes take an exceedingly long time, and result in half measures and compromises which continue the confusion. Hopefully, the current administration will avoid these pitfalls. However, as policy officials become enmeshed in day to day operational problems, it becomes more difficult to deal with broader issues. While we are told the time is past for a new Executive Order, or not ripe, we believe it still warrants serious consideration. A new Order which clearly enunciates the Administration's commitment to fairness should be welcomed.

Should this prove infeasible, we believe that there is another means of achieving this result. We understand that this Committee is currently considering legislation to reauthorize the federal job training program. Certainly CETA needs review and reform and we understand that Chairman Hatch and Senator Quayle are seriously considering alternatives. Perhaps building in an affirmative action component with clear definition as to what the terms means, as well as explicit direction to the Secretary of

Labor regarding the future of the OFCCP and the Contract Compliance Program will go a long way towards achieving fairness. This should not be viewed as an attack on the program, but rather as a means of assuring its continued viability. Without job training at the company level, true affirmative action is an ideal which will never be reached. The legislation could clearly set out the limits of OFCCP authority and resolve the remedial questions. Certainly ASPA would be willing to work with the Committee regarding this.

In other areas of reform, one of our major problems is the overly complicated maze of regulations promulgated by the OFCCP and the EEOC. For example, the Uniform Employee Selection Guidelines have been adopted by the OFCCP. In our view, these need major overhaul. The record keeping requirements are great, and are in addition to the already significant OFCCP record keeping obligations. We would therefore urge this Committee to exert its influence on the Administration to quickly revise those guidelines.

In the 1964 debates, Senator Humphrey described Title VII as follows:

> "Nothing in the bill or in the amendments requires racial quotas. The bill does not provide that people shall be hired on the basis of being Polish or Scandinavian or German, or Negro, or

> members of a particular religious faith. It provides that employers shall seek and recruit employees on the basis of their talents, their merit, and their qualification for the job.
>
> The employer will outline the qualifications to be met for the job. The employer, not the Government, will establish the standards.

Were this the policy the government follows, these hearings may not have been necessary. Certainly the current testing guidelines run counter to Senator Humphrey's understanding. The government does set the standards. It would not seem to be an insurmountable problem to bring the regulations back to Senator Humphrey's standards, and we urge quick action on this effort.

Finally, the question of goals and timetables should be addressed. We would submit that the debate might be better focused. Those who assert that goals have not been transformed into quotas in practice, and in current agency policy have not had much day to day experience. We caution that we are not talking about judicial remedies ordered after a hearing. Whether those are appropriate is beyond the purposes of these hearings. Too, the question of "voluntary" efforts is not being addressed. We refer instead to the OFCCP requirements. There, it is certainly evident that reform is long overdue. When dealt with in the refined atmosphere of academic debate, or the tightly controlled situation of a judicial proceeding, goals and timetables assume different roles. In the real world of employment, and especially in the dispersed operations which mark American business, targets or measurement tools are necessary for control. However, those targets must be flexible, realistic and meaningful. The OFCCP assumption, as clearly stated in its current operations manual and in practice is that the "flexible targets" must be rigidly observed and failure to meet them creates a strong presumption of discrimination. We believe that this philosophy changes the concept completely. The question then is whether numerical standards can be controlled so that individual rights are not lost in a race for statistical purity. In our view, this is possible with careful reworking of the methodology for determining availability, and with the understanding that employers can set their own standards. If this is done, numerical measures should still be used. If this proves impossible, then we would have to join those who view them as an impermissible governmental intrusion on individual rights.

Mr. Chairman, the issue of affirmative action and contract compliance has too often been couched in terms of good vs. evil, progressive vs. reactionary. We believe these hearings go a long way towards dispelling that polarization. You are examining a highly technical issue with deep meaning for the future progress of our society. Understanding that we all share the commitment for equality expressed by the President in his first press conference and by each of his predecessors regardless of party, we will be able to revitalize a program which has made great contributions to our society and serves as an expression of our highest ideals. Without this effort, we all stand to lose.

The **Chairman**. Thank you.

Dr. Sandler.

STATEMENT OF DR. BERNICE SANDLER, AMERICAN JEWISH COMMITTEE, WASHINGTON, D.C., ACCOMPANIED BY HYMAN BOOKBINDER

Dr. **Sandler**. Thank you, Mr. Chairman.

I am Bernice Sandler. I think you know me more in my capacity as director of the project on the Status and Education of Women at the Association of American Colleges, but I am not testifying on their behalf today; I am testifying on behalf of the American Jewish Committee, where I serve as a member of their domestic affairs commission and on various other committees. I am also accompanied by Hyman Bookbinder, AJC's Washington representative.

The **Chairman**. We are happy to have you testify.

Dr. **Sandler**. Rather than begin with summarizing my testimony, which will appear in full in the record, I would like instead to respond to several of the questions and issues which have been raised by some of the preceding witnesses.

We heard that the commitment of employers is so strong that we no longer need some of these laws and regulations. I would say that the large number of cases which have been filed under Title VII of the Civil Rights Act and under the Executive order certainly indicates that the commitment of employers is not consistent throughout the business world.

I might point out that we all have a commitment to stop at red lights; we all have a commitment to pay our taxes at the end of the year; but I am not so sure that we are willing to abolish those laws because so many of us have such a commitment to do so.

We heard that it is important to increase the supply of talented women and talented minorities. That is undoubtedly true. But I would also like to point out that having a supply does not necessarily mean that those people will be hired.

For example, in the area of higher education the unemployment rate of women with Ph. D.'s in the social sciences and sciences is about two to four times that of men with Ph. D.'s. In history, the unemployment rate of women with Ph. D.'s ready and willing to work is 10 times that of men with similar Ph. D.'s.

I also want to point out that I have been somewhat amused this morning upon hearing the different versions of affirmative action. It seems to me we are talking about affirmative action like the blind men each feeling describing a different part of the elephant.

The **Chairman**. It seems that way to me an awful lot sometimes.

Dr. **Sandler**. Yes. I also want to note that there is a difference between title VII and the Executive order. Title VII requires nondiscrimination. It does not require affirmative action unless someone has been charged with discrimination where by affirmative action might be required as part of a settlement or court order.

The **Chairman**. That is correct.

Dr. **Sandler**. And it applies to every employer with 15 or more employees.

The Executive order is somewhat different, because it only applies to those who voluntarily accept a contract. No one is forced to accept a Federal contract. If they accept a Federal contract, then indeed they have to follow some procedures. They have to follow procedures which are called affirmative action.

The **Chairman**. May I interrupt you just a second? Mr. Lorber is shaking is head on that.

Dr. **Sandler**. Maybe he can respond when I am finished.

The **Chairman**. On that point, do you disagree?

Mr. **Lorber**. Yes, because the coverage goes to subcontractors and employers at every level, so most employers or contractors who have never entered into a contract with the Government at all are included.

The **Chairman**. That is my understanding also.

Dr. **Sandler**. That is indeed true, Senator, but no one forces anyone to do business with anybody else. If one does not want to follow those rules, one does not have to unless one chooses to do business with a Federal contractor.

The **Chairman**. You have to admit, the interpretation of the Supreme Court and others with regard to commerce is very broad and is very difficult to escape being included within the pool of those who are subject to the Executive order.

Dr. **Sandler**. I hope, Senator, that my time was not running while we were having this colloquy.

The **Chairman**. As you have probably noticed, I have been very liberal with the time.

Dr. **Sandler**. Yes, I know. I have been watching it.

The **Chairman**. You are doing fine.

Dr. **Sandler**. OK. Another issue I want to raise concerns goals: Goals are not required under the Executive order unless there is underutilization. In other words, if the percentage of women and/or minorities working for a particular employer is substantially less than what one would expect based on the number of qualified women and minorities available in the outside work force, then, and only then are goals required. If there is no underutilization, the employer does not have to develop goals.

To the best of my knowledge, there are very few employers, if any, that have ever refused to develop goals, because they were able to say that they did fully utilize women and minorities.

The last point I want to make before I start with the summary of my testimony relates to the business of preference and affirmative action. Affirmative action prohibits preference. Its aim is to prohibit the preference that had previously been given to white males in our society at the expense of minorities and women, including, I might add, minority women.

An employer is required to make a good-faith effort. One does what one can to recruit qualified women and qualified minorities. One makes a special effort in recruiting, and so forth, and the criteria and hiring procedures have to be fair.

If all of those things occur—if indeed the best qualified person for the job is white and male—then the employer, under Executive Order 11246, as amended, is perfectly free to hire that best qualified white male.

Now I would like to summarize my written testimony, if I may and if there is time.

Despite the civil rights gains of the 1960's and 1970's, the unemployment rate among blacks, Hispanics, and other nonwhite groups is almost twice that of whites at this point. The so-called earnings or wage gap between men and women is larger now than ever, with fulltime women workers earning about 59 cents to every dollar earned by men.

Since I am representing the American Jewish Committee, I would like to give you a biblical quote from Leviticus, 27:3-4: "The worth of an adult male was 50 shekels; the worth of an adult female was 30 shekels." If you multiply that out, that is 60 percent, so we have not made much progress.

The **Chairman**. We have actually lost ground in 6,000 years.

Dr. **Sandler**. Yes. And I would not want anyone to take that as biblically ordained.

The American Jewish Committee believes that to make the dream of equal opportunity for all Americans a reality, effective affirmative action efforts are essential on the part of Government and the private sector.

The particular programs that we support—and I might add here that we reject the use of quotas, because we believe that they are destructive—but we do believe that affirmative action that recruits, trains, and upgrades people who have historically been disadvantaged is necessary.

We support special efforts to recruit qualified members of previously excluded groups, special training programs to help minorities and women, a continued review of tests and criteria, and a continued review of all jobs to make sure that the essential criteria are indeed relevant to the job.

We believe that employers need to continually disseminate the objectives and procedures of their programs to their employees. We believe that both Government and industry must continue their efforts to erase entrenched positions of discrimination in our work force. Strong Federal legislation and regulations are the underpinning of any efforts to achieve equity.

Most of the positive changes that have occurred over the past decade have been the result of having such laws and regulations in place. In fact, in most instances the Federal Government lacks the resources to directly enforce its mandate at every workplace and site.

Most Federal contractors will never see a Federal official concerning affirmative action. Most compliance is voluntary. But knowing what the law requires and knowing that a violation could bring about the loss of a contract has made a difference in bringing about some changes. But not enough change has occurred, and no case can be made that the time has come to drop vigorous implementation of our equal opportunity laws.

We also recognize that if women and minorities are to fully participate in the workplace, they need the opportunity to fully participate in our educational system at all levels, so that they can develop the skills which are critical to entering advancement in the work force.

Thus, we would also support vigorous enforcement of title IX of the Education Amendments Act of 1972 and title XI of the Civil Rights Act of 1964, which together protect individuals from discrimination in education based on race, color, national origin, and sex. We oppose any changes in either of these laws.

Thank you.

[The prepared statement of the American Jewish Committee follows:]

STATEMENT

of the

AMERICAN JEWISH COMMITTEE

The American Jewish Committee welcomes this opportunity to express our views on affirmative action, and in particular on the proposed affirmative action rules for Federal contractors.

The American Jewish Committee is a national organization of approximately 40,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The American Jewish Committee is committed to helping eliminate discrimination and achieve full civil rights for all Americans, regardless of race, creed, color, sex or national origin. To this end we have filed amicus briefs in cases ranging from school desegregation (Brown v. Board of Education, Keyes v. School District of Denver,) to equal rights for women (Vorcheimer v. School District of Philadelphia, Cannon v. University of Chicago, and Kirchberg v. Feenstra.) In addition, the American Jewish Committee has vigorously supported the enactment and enforcement of major civil rights legislation including Title VII of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972.

As the past decades have shown us, however, the legal requirement of non-discrimination is by itself not sufficient to erase the results of systematic discrimination in our nation. For, despite the civil rights gains of the 60's and 70's, the unemployment rate among Blacks, Hispanics, and other non-whites is almost twice that of whites. And, the so-called earnings or wage gap between men and women is now larger than ever, with full-time women workers earning only 59¢ to every dollar earned by men.

The American Jewish Committee believes that to make the dream of equal opportunity for all Americans a reality, effective affirmative action efforts to enable minorities and women to enter the mainstream of American life are necessary and require continued efforts by government and private resources.*

AJC has been part of the national debate on affirmative action since 1974, when Marco De Funis sued the University of Washington Law School for "reverse discrimination." While we reject the use of quotas as destructive of individual rights, we believe that affirmative action which recruits, trains, and upgrades those who have been historically disadvantaged or discriminated against is necessary. Types of programs we strongly support are:

1. Special efforts to recruit qualified members of previously excluded groups for available job openings. This means going beyond the referral sources traditionally used, and especially employing community resources that reach out to members of previously excluded groups.

2. Training programs to help minorities and women,** and those from disadvantaged backgrounds. These should include tutoring, apprenticeship and in-service training programs.

3. Continued review of all tests to make sure they are relevant to the job and as free as possible from cultural and other bias.

4. A continued review of all jobs to make sure that the essential prerequisites for them are still valid, and indeed related to the job.

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* In addition, both Title VI and Title IX are vitally needed to insure that women and minorities get the opportunity to develop potential for employment.

** Including minority women.

5. Within the context of the affirmative action principle, the granting of special consideration to those applicants from among those discriminated against or disadvantaged who are substantially equal in qualifications to others being considered.

6. A program of continuous dissemination of the objectives and procedures of the affirmative action program within the company or organization.

The Proper Limits of Affirmative Action

While there are those who argue that on a short term basis quotas are necessary to remedy entrenched patterns of discrimination in our workforces, AJC is convinced that their inherent dangers outweigh any temporary gains they might bring. Quotas unnecessarily trammel the interests of others since they close off the possibility that individuals from non-preferred groups can compete for the places set aside by the quota. While those admitted or hired under quota plans are not necessarily less qualified than others, quotas have been perceived as an assault on the concept of qualifications and standards of individual merit because the race or sex of the applicant becomes the determining factor in filling the places set aside by the quota.

One of the most pernicious results of the use of quotas is that they have led to the acceptance of the concept of group preference and proportional representation, whereby the fact that one is a member of a particular racial, ethnic, religious or gender group determines one's chances for a job, promotion, or acceptance by a university. As the American Jewish Committee said in its brief in Regents of University of California vs. Bakke:

> "A society permeated by racial, ethnic, religious and sexual proportional representation would be something quite different from the ideal we have striven for for so long. . .Racial and ethnic classifications

would be officially sanctioned and recognized in all walks of life; each professional or office-holder would be regarded, and would regard himself, as a representative of a group from whose quota he comes; and individual aspirations would be limited by the proportionate size of the group to which the individual belongs."

Finally, the use of quotas has tended to exacerbate intergroup tensions over affirmative action and has produced a backlash against other less intrusive forms of affirmative action such as reasonable goals and timetables, expanded recruitment and job training, and assuring that tests and criteria for employment actually are job related.

Goals and Timetables vs. Quotas

While the American Jewish Committee rejects quotas, we recognize that the use of numerical data and statistical techniques may be necessary to assure the effectiveness of affirmative action programs. Thus, we support the proper use of goals and timetables.

As opposed to a quota, a goal is a realistic numerical objective, arrived at in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job market. An employer should never be expected to displace existing employees or hire poorly qualified employees to meet the goal. Goals are flexible and can be adjusted if they are shown to be unrealistic. An employer is not subject to sanction if he or she has demonstrated good faith efforts through affirmative action to meet the goal (through advertising to women and minority groups, interviewing, making realistic job offers, etc.)

Constitutional Amendment Banning the Use of Quotas

Despite our opposition to quotas, the American Jewish Committee would oppose the introduction of a constitutional amendment banning their use.

Programs to Stimulate Economic Growth and Deal with Unemployment

In addition to affirmative action, the AJC urges the necessity of government programs to stimulate economic growth and decrease unemployment, which hits hardest on the black, Hispanic, and other minority communities. These programs should include allocating Federal programs and contracts to those communities and those sections of the nation where unemployment is the highest.

Affirmative action is most effective in an expanding economy. Unfortunately, many gains won by affirmative action have been lost as a result of the necessity of massive layoffs, which have a disproportionate impact on minorities and women, often the last hired, and, therefore, the first fired under seniority agreements.

For several years AJC has supported work-sharing, which permits the payment of unemployment benefits to workers laid off only partially. This enables an employer to spread out a reduced amount of work over an entire work force rather than laying off individual workers. For example, instead of laying off ten of a company's 50 workers, an employer puts 50 on a four-day week, with each employee receiving one day of unemployment insurance. California has had such a law since 1978. Taking into account the reduction in taxes, carfare, and lunch costs, work-sharing employees generally end up with between 90 and 95% of their full-time wage, retain their health insurance and other fringe benefits.

Affirmative Action Requirements for Government Contractors

AJC is deeply concerned that the August 25 proposed regulations on nondiscrimination and affirmative action will result in substantially weakening the OFCCP's mechanisms for combatting discrimination. While we commend the OFCCP's efforts to encourage voluntary compliance and to streamline paperwork for employers, we urge careful examination of the impact of the proposed rules on employment opportunities for minority and women employees. In particular, we object to substantially reducing the number of establishments required to file written affirmative action plans, weakening the remedies available to combat discrimination, and in many cases abandoning measurable goals and timetables as standards for compliance.

Since the OFCCP has the constitutional responsibility of assuring that Federal funds do not benefit employers who discriminate, the goal of any regulations must be to create a stronger, more effective program. We believe that effectiveness can be strengthened while at the same time encouraging voluntary compliance and streamlining paperwork, but experience prior to 1968 has shown that voluntary, generalized obligations are not sufficient to deal with widespread entrenched patterns of under-utilization of women and minorities in our workforce. Because several of the August 25, 1981 proposals substantially weaken enforcement mechanisms for combatting discrimination, AJC opposes them.

Thresholds for Written Affirmative Action Plans §60-1.40*

AJC believes that written affirmative action plans stating definite numerical goals are necessary to assure the effectiveness of affirmative action efforts. The proposal to exempt contractors with less than 250 employees or lacking single contracts of over one million dollars from developing written affirmative action plans will (according to Department of Labor analysis) eliminate such protection for one fifth of employees currently covered. But, if this were not bad enough, in certain industries, such as higher education, the raised threshold would exempt the vast majority of institutions from any requirement to develop plans. For example, WEAL (Women's Equity Action League) has estimated that 80% of the nation's colleges, including major universities such as Yale, Brown, Ohio and Duke, would be exempted under the proposed regulations despite the fact that many institutions receive an aggregate of Federal contracts amounting to several million dollars. In addition, only 30% of the women now covered under written plans would still be covered if these changes are enacted. Before any changes are made in the threshold requirements for filing written plans, AJC urges that the OFCCP make a careful study of the impact of such changes on specific industries.

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*Section numbers refer to regulations proposed on August 25, 1981

Elimination of Pre-Award Reviews §60-1.20(d)current

AJC objects to the elimination of the OFCCP's authority to act before the award of a contract. Reviews of employment policies before issuance of contracts are necessary to insure that Federal funds are not made available to those who would discriminate. While reduction in the scope of pre-award reviews, or of the frequency of reviews may be warranted, eliminating what is now an integral part of the contract compliance program is not.

Five-Year Exemptions from Compliance Reviews §60-2.3(c)

AJC also objects to the proposal to award five-year exemptions from compliance reviews rather than requiring (as do the December 1980 regulations) affirmative action plan summaries to be filed each year. In our opinion, affirmative action plans can grow out of date in five years. An employer's employee level, level of contract awards, and workforce structure can change substantially in that period of time. Employers would have no incentive to reassess the utility of their plans during the five-year period or to make changes where appropriate.

Equal Pay for Work of Comparable Value (current §60020.5)

One of the most serious problems facing women in our economy is occupational segregation and the devaluation of work traditionally performed by Women. Despite the large percentage increases in women entering some traditionally male occupations in the past decade, the actual numbers of women in these occupations is small. Currently over 60% of women workers are concentrated in twenty predominantly female low-paying occupations (35% of full-time female workers are clerical workers). In order to address the primary form of discrimination facing women in the workforce and to begin to close the wage-gap, whereby the average full-time female worker earns only 59¢ on every dollar earned by her male counterpart, sex-segregated workforces must be closely scrutinized. Therefore, AJC opposes the proposal to drop language in the current December 1980 regulations that provide "compensation practices with respect to any jobs where males or females are substantially underutilized will be scrutinized closely to assure that sex has played no role in setting levels of pay".

In summary, AJC hopes that under the new Administration the national commitment to provide equal employment opportunities for all Americans will be reaffirmed and strengthened. We believe that both government and industry must continue efforts to erase entrenched patterns of discrimination in our workforces. Strong Federal legislation and regulations are the underpinning of any efforts to achieve equity. Many of the positive changes that have occurred over the past decade have been the result of having such regulations in place. In most instances the Federal government lacks the resources to directly enforce its mandates at every workplace and site. Most Federal contractors will never see a Federal official concerning affirmative action. Most compliance is voluntary. Knowing what the law requires and knowing that a violation could bring about the loss of a contract has made a difference in bringing about some changes. But not enough change has occurred.

To be effective these efforts must include written affirmative action plans with clearly established goals and timetables, special efforts to recruit and train minorities, women, and those from disadvantaged backgrounds, and periodic review of employment tests and job prerequisites. Government agencies such as the OFCCP and the EEOC must continue, as they have in the past decade, to be in the forefront of this national commitment. In this regard, we oppose the proposed rules which would substantially weaken the OFCCP's enforcement of Executive Order 11246.

Respectfully submitted,

Dr. Bernice Sandler*
Chairperson, Women's Issues Committee
Domestic Affairs Commission
The American Jewish Committee

*Executive Associate
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Washington, D.C.

BS/lk
81-630-46

The **Chairman**. Thank you.

I want to thank all witnesses today, because I think we have had some very interesting testimony on various aspects of these issues, particularly this panel, because I think all three of you have tried to give us a number of suggestions as to what we might try to do to get this system to work a little bit better for the benefit of women and minorities.

I am not sure that there are any real quick solutions. As you say, 6,000 years, and you have lost ground. That may be debatable, however, when I look at those biblical years. Women have come a long way since those days. There are some other scriptures I could go over with you on that, from Leviticus, by the way.

I think that what we are doing here is really, hopefully, developing the debate in what really is a very difficult subject to get a lot of excitement over—the OFCCP—on affirmative action there is a lot of excitement. It was not always this way. It used to be pretty well undebated, it seems to me, a number of years ago, except by academic purists and philosophers. But today we really are concerned about it.

We have had some political statements here by some witnesses who have indicated their displeasure with the present administration and perhaps with this committee. But the point we are trying to make here is that we have to really start looking at these programs, and not just these but so many programs in Government which are not working or which are not working as well as they should.

I do believe that each of you has added a great deal to the hearing—each witness today. I am grateful to you. I have some questions I am going to submit to you in writing, and I hope you will answer them as soon as possible, because we will want to get our record as complete as possible as soon as possible.

At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

STATEMENT OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL

INTRODUCTION

The Equal Employment Advisory Council (EEAC) welcomes this opportunity to provide its views on the possibility of revising both the direction and the administration of the Office of Federal Contract Compliance Programs (OFCCP). The Council was organized in 1976 to present to the judiciary and the federal government the views of business and industry concerning equal employment opportunity and affirmative action through amicus curiae briefs, appropriate comments on proposed regulations, and analytical studies. Its founders were concerned that precedent setting decisions were being made without the benefit of a detailed articulation of all of the issues which should be debated or of the practical consequences of the actions being considered. The Council was established to provide this explanation and suggest solutions to both courts and administrative agencies. From the outset, EEAC has been fully committed to the achievement of equal employment opportunity and has supported governmental policies and procedures which achieve that equality in the context of the economic realities in which all businesses and industries must operate.

Despite more than a decade of enforcement, the Executive Order 11246 program has not been as successful or beneficial as it could be nor will its shortcomings be rectified by the recent regulatory proposals promulgated by the Department of Labor. Its problems are not, however, an inescapable consequence of the federal government's regulation of affirmative action programs. The program can be improved if those involved are willing first to analyze both the failings of the current regulations as well as the actual barriers to true equal employment opportunity and then develop a program capable of overcoming these deficiencies, regardless of whether it fits within the confines of the existing regulatory framework.

In our statement, we have attempted to meet this challenge. The first section concerns the problems with the existing program and the critical issue impeding the job mobility of minorities and women -- a lack of the necessary skills or education. The second portion of our statement demonstrates that the Department of Labor's proposals fail to correct these problems and the third section provides several solutions which, if adopted, could turn the Executive Order program into a positive, productive federal activity.

PART I. THE PROBLEMS WITH THE EXISTING PROGRAM

Today, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP), a division of the Department of Labor, are the two federal agencies principally responsible for enforcing the government's statutory and regulatory prohibitions against employment discrimination. EEOC's authority stems from Title VII of the Civil Rights Act of 1964 and its jurisdiction extends over both the private and public sectors. It is charged with protecting individuals and classes of individuals from discrimination by employers or unions, and with seeking relief such as reinstatement and back pay for victims of past discrimination.

OFCCP is the product of two Executive Orders, E.O. 11246 as amended by E.O. 11375. Its mission differs from EEOC's, and, in fact, earlier versions of the Orders predated Title VII. OFCCP's current program is based on the conviction that more was needed to remedy societal and employment discrimination than simply the assurance of neutrality in personnel decisions. Policies which prohibit discrimination against equally qualified candidates tend to benefit only those minorities and women who already are qualified for and interested in the positions sought. For the many minority and female candidates who are interested but unqualified due to economic or educational disadvantage, affirmative steps have been needed to make them both qualified and aware of their rights and opportunities. Thus, OFCCP was charged with ensuring that all federal contractors and subcontractors not only refrain from discriminating against individuals or classes, but also take affirmative action to ensure the equality of employment opportunities. This affirmative action requirement is met in most instances by the development and implementation of an affirmative action plan (AAP) containing hiring and promotion goals for minorities and women. In addition, contractors are required to develop AAPs without goals for handicapped individuals and Vietnam veterans.

Unfortunately, the Executive Order program has not been as successful as it could be. This is primarily due to confusion as to its purpose, unnecessary and burdensome regulation, irregular enforcement, lack of incentives for voluntary compliance, and the size of its mission. These problems are compounded by the traditional factors which burden all governmental bodies such as bureaucratic institutionalism, ignorance of or disdain for other federal programs, and a lack of staff training. The principal problems with the Executive Order 11246 program are discussed below.

A. Confusion Over the Agency's Purpose

Since its inception, OFCCP has slowly shifted its emphasis from monitoring contractor affirmative action efforts to seeking monetary and other remedies for what it views as past discrimination. This development may have been caused in part by the agency's dual mission as outlined in Executive Order 11246. From a more practical standpoint, it may have stemmed from a need to provide a tangible product for the contract compliance program for Congress during appropriation hearings. In other words, it was easier for agency officials to point to a total amount of back pay collected than to attempt to explain the significance of variety of individual contractor good faith efforts.

Regardless of the reason, OFCCP has evolved into a regulatory posture that frequently overlaps the mission of the EEOC. Virtually all federal contractors or subcontractors who undergo OFCCP's compliance reviews fall within EEOC's jurisdiction under Title VII.[1/] This duplication has led to competition between the agencies to negotiate the largest back pay awards or sue the biggest and most visible corporations. This competition is compounded by the mistaken presumption by officials at the two agencies that rigorous enforcement efforts against major companies will push smaller firms into compliance without any direct governmental involvement. The only real consequence of these developments has been that large corporations tend to be constantly undergoing reviews,[2/] and

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[1/] Title VII covers all employers with 15 or more employees involved in interstate commerce. 42 U.S.C. § 2000e(b) Executive Order 11246 applies to financial institutions which serve as depositories for federal funds and to all federal contractors or subcontractors with government contracts in excess of $10,000. 40 C.F.R. § 60-1.5(a)(1). In practice, however, only a very few contractor establishments of less than 50 employees are ever reviewed.

[2/] One contractor with 113 facilities underwent 135 compliance reviews in one year. Another contractor had a facility reviewed once a year for seven consecutive years.

that investigation by one agency is no bar to a simultaneous or subsequent investigation of the same employer by the other.[3/]

There is also confusion as to whether the purpose of the program is for contractors to use affirmative action to establish equal employment opportunity evidenced by job mobility or to achieve employment parity measured by the number of jobs actually held by minorities and women. Over the last several years OFCCP officials apparently have adopted the latter objective. Current regulations indicate that under the Executive Order program equal employment opportunity is achieved only when there is an exact numerical equivalency between the representation of minorities or women in a given job and their representation in the appropriate labor pool for that job. Such exactness leaves little room for the numerous vagaries other than discrimination that give rise to differences in representation.

[3/] The First Alabama Bank of Montgomery is an example. The bank was sued by the EEOC in 1969. The litigation culminated in a court order pursuant to which the court monitored the EEO activities of the bank through quarterly compliance reports. The reports were filed for more than six years until the court determined in August of 1979 that they no longer were necessary. During the reporting period three E.O. 11246 compliance reviews were conducted, all of which resulted in determinations that the bank was in compliance. Three months following court termination of the reporting requirement, OFCCP commenced yet another compliance review which would have encompassed many of the same issues involved in the Title VII litigation and earlier compliance reviews. The bank refused to submit requested data contending that the ongoing investigations were unnecessarily burdensome and expensive. On March 16, 1981 the bank was debarred for failure to cooperate in the compliance review. OFCCP v. First Alabama Bank of Montgomery, 80-OFCCP-32 (March 16, 1981). Quite apart from whether the bank's refusal to cooperate was a technical violation of E.O. 11246, there remains a serious question whether OFCCP's selection of the bank for yet another review constituted a wise allocation of the agency's limited resources in light of the extensive earlier compliance activities.

B. Inconsistent Legal Standards

OFCCP contends that the affirmative action commitments of federal contractors under E.O. 11246 impose greater obligations on contractors to eradicate discrimination than does Title VII, so that conduct lawful under Title VII may nevertheless be unlawful under the Order. The agency refuses to acknowledge that Title VII represents Congress' most comprehensive regulation of employment discrimination, and that E.O. 11246 supplements rather than supplants the statutory scheme.

A clear example of this problem is the legality of seniority systems. Since white males who were hired in the past at a time when women and minorities may have been discriminated against will always have greater seniority than more recently hired women and minorities, seniority systems tend to perpetuate past discrimination. Section 703(b) of Title VII, 42 U.S.C. § 2000e-2(b), however, specifically protects such systems and, thus, reflects Congress' determination that the substantive definition of employment discrimination should exclude the operation of _bona_ _fide_ seniority systems. _Teamsters v. United States_, 431 U.S. 324 (1977). OFCCP has chosen to ignore the accommodation of competing interests embodied by Congress in Section 703(b), and has concluded that the maintenance of such seniority systems constitutes a _willful_ _violation_ of E.O. 11246.[4/]

[4/] See _Federal Contract Compliance Manual_, Section 1-60.107 (hereafter _Manual_).

To date, OFCCP's position has been rejected by the courts but, of course, only after contractors have spent extensive amounts of money in legal fees defending their position.[5/]

C. Unnecessary Paperwork Requirements

OFCCP does not approach its data requests on the basis of need. Most compliance reviews involve a routine data demand for almost all personnel records that may have been affected by an affirmative action program. The agency still eschews well-accepted auditing techniques, such as random sampling. There is no indication that thought is given to the cost to the contractor of preparing the data, the probative value of the data once collected, or the agency's ability to review the data submitted. Contractors frequently spend thousands of dollars in time and resources developing information which is unnecessary for determining compliance with the Order or is beyond the capability of the government to evaluate.[6/]

[5/] See, *e.g.*, *U.S. v. East Texas Motor Freight System*, 564 F.2d 179, 185 (5th Cir. 1977); *U.S. v. Trucking Management Inc.*, ___ F. Supp. ___, 20 FEP Cases 342, 348 (D.D.C. 1979), *appeal docketed*, No. 79-2103 (D.C. Cir.). In addition to seniority systems, OFCCP also asserts that its authority may be more extensive than that of EEOC with respect to statutes of limitation, and sex-based wage discrimination (i.e., "comparable worth"). See § 2-250.2c of the *Manual*.

[6/] For example, one contractor whose total employment exceeds 400,000 had one of its smaller facilities reviewed in May, 1979. The facility employs 2,000 individuals. The subsequent data request by OFCCP took company officials a total of 4,500 hours to complete. A year later, the company was notified it was in compliance. At that rate, similar data requests for the whole company would require 900,000 work hours to complete. Another contractor was informed by OFCCP to furnish copies of the employment files of 350 employees, all of whom had been with the company for several years. The contractor notified the agency that the requested data, if accumulated, would

D. Arbitrary Standards

OFCCP has developed a series of rigid, numerical standards to measure contract compliance that not only are unnecessarily difficult to meet, but also are of little benefit to the general purpose of the program. For example, the agency requires that hiring or promotion goals be set in all instances where the contractor is "underutilized," *i.e.*, whenever the current percentage of minorities and women in a job fails to match exactly their representation in the relevant labor pool.7/

(footnote continued)

involve over 10,500 pages and suggested that to save the duplication cost, the agency could visit the facility and review the original files onsite. The agency responded that it did not have a sufficient budget to make such visits and that if it did not receive copies of the files, the contractor would lose its federal contracts. It is highly doubtful that the one compliance officer assigned to the contractor would be able to analyze each page of data and comprehend its meaning while it was still timely.

7/ See § 2-180.2 of the *Manual*. The *Manual's* definition of underutilization is much stricter than that found in 41 C.F.R. § 60-2.11(b) of OFCCP's regulations, which states:

> "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability.

Given the lack of precision in calculating the availability portion of the utilization analysis (see footnote 8), defining underutilization as "any numerical disparity" is excessively rigid. In *Firestone Synthetic Rubber & Latex Co. v. Marshall*, ___F. Supp.___, 24 FEP Cases 1699 (E.D. Tex. 1981), the contractor argued that underutilization need not be declared unless the disparity between incumbency and availability is greater than would be expected by applying a 5 percent statistical significance test. The Department of Labor disagreed and concluded that a "direct comparison of incumbency to availability is the only method cognizable under the regulations of § 60-2.11(b)." The court concluded that DOL's

A major problem arises from the extremely difficult task of establishing who should be considered "available " for the labor pool. In most instances, the determination of availability is at best no more than a rough estimate. Nonetheless, under existing regulations, the agency demands that current representation precisely match this imprecise standard.

The controversy over estimating "availability" involves both conceptual and practical issues. On a conceptual basis, contractors tend to rely heavily upon the number of women and minorities who actually possess the skills required to do the job (frequently referred to as "current" availability), while OFCCP tends to rely heavily upon the number of women and minorities who may not presently have the requisite skills, but who are capable of acquiring them at some unknown point in the future (often described as "future" availability).8/ Estimating how many individuals are capable of being qualified, and projecting into the future the rate at which they will become

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(footnote continued)

interpretation was inconsistent with the regulations because (1) the "reasonably be expected" standard is subjective while DOL's test is objective, and (2) the regulations require that all eight factors in § 60-2.11(b) of the regulations be considered in determining the need to declare underutilization, only one of which is an estimation of availability.

8/ See §§ 2-160.7c through 2-160.7c5 of the Manual and § 1-60.15 which defines "availability" as "[t]he percentage of minorities or women who have the skills required for entry into a specific job group, or who are capable of acquiring them." (Emphasis added).

qualified, is a subjective, impractical process, the results of which should not warrant their use as a precise standard for measuring utilization.

Problems with availability also are caused by OFCCP's regulations. Section 41 C.F.R. 60-2.11( ) delineates eight factors which must be considered when determining availability. Few of the factors can be quantified and they are not mutually exclusive. One individual could easily qualify for inclusion under several factors. Consequently, from a practical basis, availability often tends to be more a reflection of the respective negotiating abililities of the contractor and the compliance officer than an indication of how many minorities and women are actually available to fill job openings.

Similarly, contractors are required to set goals even in those instances when they are, from a numerical standpoint, less than one whole person away from being in compliance. This requirement has led in some instances to substantial amounts of time being spent on the paperwork necessary to demonstrate that a contractor is taking all necessary steps to ensure that it is hiring fractional persons.[9]

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[9] Section 2-190.1a of the Manual provides in relevant part:

> Annual goals and timetables must be established by the contractor for each job group in which minorities or women as applicable are underutilized by one or more individuals. Where the contractor is underutilized by less than one person, ultimate percentage goals will be established. ... (Emphasis added)

E. Unrealistic Goals and Timetables

In the past, OFCCP has acknowledged that it has required contractors to set goals and timetables for hiring and promoting minorities and women at levels that exceed their current availability in the labor market.[10/] The agency feels that these inflated levels are necessary to stimulate change and that contractors must assume the burden of increasing availability levels. Consequently, it frequently is impossible for companies to be in full compliance with the government's goal requirements.

Moreover, timetables must be established to accomplish the goals in "the shortest feasible time period." Since failure to accomplish 95 percent of a goal in the time projected results in additional scrutiny of the contractor's employment policies (Manual § 2-30.4 and §§ 2-200.3 through 2-200.3j), the present system of goals and timetables has operated more as a quota than a goal.

[10/] This is because ultimate goals "must equal the percentages of minorities and women determined to be available for the job group" (Manual § 2-190.3) which, as noted in footnote 8, includes individuals who are not presently qualified for the job, but who theoretically are capable of becoming qualified.

F. Unavailability of a Sufficient Number of Qualified Minorities and Women

For many positions which require detailed skill proficiency or extensive preliminary education, minorities and women continue to be underrepresented due to a lack of qualified candidates. Predictions as to their availability in the near future based on high school and college course selection indicate that this situation will not be resolved quickly. Moreover, there has been little correlation between federal training programs like CETA, and job opportunities actually available in the private sector. To date, federal training programs are not graduating minorities or women who possess the necessary skills to be hired or promoted.[11/] Without the necessary skill qualifications and experience, it is impossible for them to take advantage of opportunities for better, higher paying jobs and thus be thoroughly integrated into all levels of the general labor force.

[11/] In 1979 the Department of Labor's Employment Training Administration (ETA) and Employment Standards Administration (ESA) jointly established a "linkage" project pursuant to which graduates of ETA training programs would be "linked" with contractors undergoing E.O. 11246 compliance reviews who were in need of skilled women and minorities. In recent weeks, Department officials have indicated that the project has not yielded the results anticipated because the ETA training programs have not been teaching skills which are in demand in the private sector.

G. Scope and Cost of OFCCP's Mission

Finally, OFCCP is responsible for the employment practices of roughly 325,000 contractor establishments, employing approximately 35 million workers or 34 percent of the civilian labor force. It has attempted to accomplish this with a staff of approximately 1,500 persons and recent reports indicate that an upcoming reduction in force will reduce the agency staff to only 1,194.

The universe of contractors likely to be reviewed is somewhat smaller, however. The agency has estimated earlier this year that 16,767 companies currently are required to maintain on a collective basis an estimated 107,915 affirmative action programs (AAP's). Since the vast majority of compliance activities are focused on these contractors, it can be presumed that the actual compliance universe for OFCCP reflects these smaller numbers.[12]

OFCCP has also estimated that its regulations concerning AAP's cost contractors roughly $46 million, a figure that actually represents only a fraction of the real cost of compliance. On the basis of a survey conducted last year, the Council estimated that the Fortune 500 companies alone spend $942 million annually complying with OFCCP requirements. The annual figure for all contractors involved in the program clearly exceeds $1 billion. When it is considered that much of the existing regulatory structure has been in place for almost a decade, its cumulative costs raise serious concerns as to whether the existing program represents the most effective means for expending the resources earmarked by contractors for affirmative action.

12/ These numbers will be reduced even further if OFCCP's proposed raising of the jurisdictional thresholds covering affirmative action requirements is actually implemented.

PART II. THE INABILITY OF OFCCP'S RECENT REGULATORY PROPOSALS TO CORRECT THESE PROBLEMS

Given these seven key problem areas, it is clear that the regulatory proposals promulgated by OFCCP on August 25, 1981, will not provide the substantive revisions which are necessary to correct the contract compliance program. Some of the proposals provide needed administrative relief but, together, they do not resolve the existing confusion over OFCCP's retrospective activities. They do not establish a practical, objective mechanism for selecting contractors for review, nor do they resolve the problems concerning OFCCP data requests. They also fail to remedy the current impracticalities involving availability and goals and timetables. Moreover, the proposals indicate that for the time being, the Reagan Administration intends to adopt the OFCCP's current regulatory framework and not take advantage of the opportunity to improve upon the program's conceptual flaws. Consequently, when viewed in their totality, the proposals simply modify what has been uniformly condemned as an unsound program.

A. Jurisdictional Thresholds

Although most of the proposals are strictly administrative in nature, there are three which, if adopted, will have a noticeable impact upon the program. The first concerns the program's jurisdictional thresholds. In an attempt to gain some degree of control over its mission, OFCCP has proposed relieving all contractors with fewer than 250 employees and contracts of less than $1 million of the obligation to prepare written affirmative action programs. These new contractors would still be subject, however, to the obligations of the Executive Order itself. The agency believes that this provision would reduce the number of contractors required to submit AAP's to approximately 4,000 concerns while at the same time, enabling OFCCP to retain coverage over 75% of the employees currently covered.

The purpose behind the proposal is understandable, but the proposed thresholds are not when viewed against the overall purposes of the Executive Order program. While it may technically be true that the agency will respond to complaints and will conduct occasional compliance reviews at covered contractors not required to prepare written plans, as a practical matter most enforcement activity will be directed at contractors with such plans. Many of the contractors below the threshold limits are in growth industries which will offer substantial employment opportunities in the future. The proposal, therefore, may result in repetitive reviews of contractors in established, stable industries, while many growth industries will remain largely unreviewed. 13/

13/ A recent survey indicates that under the current regulations the Fortune 500 companies alone are targeted for more than 40% of all compliance reviews each year, a statistic that is likely to increase if the jurisdictional proposal is adopted.

Rather than distinguishing between contractors on the basis of size, the preferable route would be to improve the method used for selecting contractors for review. For example, if targeting were performed on a "worst first" basis -- i.e., contractors who appear to be doing the least in comparison with their competitors to employ and promote women and minorities would be selected first -- the agency would be able to maximize the number of employment opportunities covered by written affirmative action plans by retaining current thresholds without jeopardizing its ability to focus compliance reviews on contractors with substantial deficiencies.

The most effective method for reducing unnecessary paperwork and enhancing agency efficiency lies not in waiving admittedly ineffective procedures for a portion of the contractor universe, but in simplifying rather than eliminating affirmative action requirements for both small contractors and small facilities of large contractors and in streamlining enforcement procedures, applying them equally to contractors of all sizes.

B. Determinations of Underutilization

The second, significant proposal concerns the measurement of underutilization. In recognition of the need to bring some flexibility to the standards used by the agency to measure compliance, OFCCP has proposed to redefine "underutilization" as existing only where the utilization of minorities or women in any particular job group is less than 80% of their availability for that job group.

While the proposal seems beneficial initially, it still leaves several problems unresolved. For example, because of the size of most job groups and most availability figures, even a range of 80 to 100 percent will not protect against contractors being underutilized by a fraction of a person. Moreover, the proposal fails to acknowledge that other indicators, including generally recognized tests of statistical significance, are available to contractors as alternatives to the 80 percent rule for determining when goals and timetables must be established. Finally, it would leave intact the existing presumption that the determinative criterion of whether a contractor is engaging in affirmative action is simply the measurement of underutilization. Such a standard ignores a variety of activities benefiting minorities or women that contractors participate in, administer, or fund that do not directly impact upon their own workforce.

C. Training Programs

The final unique proposal encourages contractors to develop affirmative action training programs in exchange for an exemption for five years from routine compliance reviews. While there is no available information on how these programs will be implemented, they are, from a conceptual standpoint, a positive step. Of particular concern however, is the possibility that by participating in such a training program, a contractor would not only be subject to OFCCP's requirements but would also be encumbered by the regulations of the Employment and Training Administration. Similarly, the proposal would force contractors to provide the agency with any data derived from internal audits and the exemption could be lost if a complaint is filed against the contractor during the five year period. Obviously, these requirements are likely to discourage participation in training programs.

PART III. Recommendations for a Revised Federal Contract Compliance Program

The Executive Order 11246 program can be remedied, but to do so, will require more than the minor regulatory revisions currently proposed by the Department of Labor. It will necessitate restructuring the program to make it consistent with the following five general principles:

1. The program should be made prospective in its focus. A program that deals with contractor conduct while performing the contract and leaves responsibility for past discrimination to EEOC and private plaintiffs, will enable OFCCP to engage in a cooperative effort with contractors to foster affirmative action.
2. Contractor efforts to enable minorities and women to become qualified candidates for actual job openings should be re-emphasized. Currently the concern of government regulations is mistakenly focused on the contents of affirmative action programs and not on the relative success of a contractor's good faith efforts. Contractor training of minorities and women to become qualified for new or better jobs is more important as evidence of affirmative action than satisfying agency paperwork requirements.
3. An effective, comprehensive federal program requires inclusion not exclusion of federal contractors. A successful program cannot be limited to the largest

corporations where employment is relatively stable or declining. The majority of new jobs will be provided by small enterprises. The burden on small contractors can be substantially eliminated by reduced recordkeeping and other paperwork requirements.

4. Incentives for compliance must be an integral feature of any federal program in which the regulated vastly outnumber the regulators. To date, compliance with the program provides no guarantee of freedom from costly compliance reviews or repetitive regulation. Incentives for compliance, such as regulatory relief for engaging in special training programs or for successfully completing a compliance review, should be adopted. Contractors should be selected for review on a worst first basis.

5. The program must be capable of demonstrating its effectiveness. The value of a program designed to foster affirmative action should not be measured by the size of monetary penalties demanded or the number of contractors debarred. The purpose of affirmative action is to increase minority and female employment at all levels of the workforce. The determinative standard should be the number of minorities or women who obtain jobs or improve their employment status because of the program.

By amending the current federal contract compliance program in conformity with these principles, the program could be transformed into a positive federal activity. The thrust of the program would no longer be on compliance with forms. It would be targeted at the purpose of both affirmative action and the original contract compliance programs--enabling minorities and women to take advantage of the opportunities for long-term employment which are available in the private sector. It is important to note that the spirit of cooperation between contractors and the government which is necessary to achieve this objective cannot be fostered if the program continues to be a vehicle for punishing contractors instead of assisting minorities and women.

The following is a more detailed explanation of how these principles can be implemented to establish a program for the second generation of affirmative action.

A. The Program Should Be Made Prospective

EEOC's mission is retrospective under Title VII of the Civil Rights Act of 1964. It is charged with protecting individuals and classes of individuals from discrimination by employers and unions, and with seeking relief such as reinstatement and back pay for victims of past discrimination. Under E.O. 11246 and 11375, contractors are prohibited from discriminating but also must engage in affirmative action to ensure the equality of employment opportunities. OFCCP interprets this mission as applying both retrospectively and prospectively. Instead of leading to a practical division of authority, this duplication has resulted in bureaucratic competition to negotiate the largest award of back pay or bring enforcement actions against the most visible corporations.

To end this overlap, OFCCP's authority should be made prospective, limited to ensuring that government contractors are undertaking affirmative efforts to enhance the employment opportunities of women and minorities. The agency would not be involved in the investigation, prosecution, settlement or adjudication of discrimination claims. The responsibility for affording retrospective relief to alleged victims of discrimination, such as front and back pay, seniority and reinstatement, is adequately covered by EEOC and private litigants under Title VII and other statutes. Thus, all complaints of individual or class discrimination arising under the program would be referred to EEOC.

By making the program prospective, the Administration would also ameliorate much of the employer concern with the arbitrariness of compliance standards under the program. These include the measurement of underutilization or determinations of availability. Agency officials feel these strict standards are necessary to stimulate improvement. Contractors, on the other hand, object to the inflexible manner in which they are enforced because they can result in inaccurately classifying a contractor as being discriminatory and thus responsible for providing large awards of compensatory relief to affected employees, even though the same facts often would produce no such finding under Title VII or other Civil Rights statutes. If OFCCP's focus is made prospective and its standards for affirmative action are not used by the agency as a means for demanding Title VII type relief from contractors, it will be much easier to develop among all the parties involved (OFCCP, minorities, women's, and handicapped groups, contractors) a consensus on a more constructive approach to the components and measurement of affirmative action.

B. Training Programs Should Be Encouraged

The purpose of affirmative action is to increase the pool of qualified minorities and women. The existing program fails to address this issue directly, concentrating instead on the formalities of compliance. The following four recommendations are based on the presumption that it is better to spend the money now absorbed by compliance with OFCCP regulations (over $1 billion each year by employers) on activities which either can make minorities and women qualified candidates or make openings available to them.

1. Special, Voluntary Contractor Training Programs

Private contractors, who have the best information on job openings and promotion opportunities within their own workforce, could develop their own voluntary special training programs for the economically and educationally disadvantaged, capable of providing attendees with the necessary skills to be qualified for these openings. One indicia of disadvantage could be long-term unemployment. The programs could be established on a facility or other corporate division basis, and should be designed to utilize the contractor's specific capabilities to maximize minority and female employment opportunties. For example, they may be directed at jobs for which there are openings or in which minorities and women traditionally have been underrepresented. Moreover, they would not have to be limited to entry level positions but could also provide the training necessary to qualify current employees for promotion. While the extent of such programs would have to be negotiated with OFCCP, their content would be left to the contractor without agency regulation or review. The only standard of acceptability would be that the contractor would have to exert good faith efforts to insure that the program would accept minorities and women at a rate commensurate with their representation in the relevant labor market and that it would hire and, for current employees, promote these graduates at a similar rate. The contractor would have the burden of explaining any failure to satisfy these obligations.

By engaging in such a program a contractor would be exempted from compliance reviews for a three-year period. However, a review could be stimulated by meritorious complaints of noncompliance, i.e., complaints which demonstrate on their face or through supporting affidavits that immediate and irreparable injury, loss, or damage will occur if the complaint is not processed immediately. Whether to participate in such programs would, of course, be the choice of the contractor.

2. Community Apprenticeship and Training Programs

Given current economic conditions, many federal contractors will be unable, in the near future, to hire additional individuals, regardless of their training. Nonetheless, these companies often already have developed corporate training programs or skill enhancement classes for their own employees. To utilize this existing resource, a contractor would receive an exemption if it provided to the general public apprenticeship and training programs involving skills for which there are job opportunities in the contractor's community. Such programs would either be gratuitous or require a minimal registration fee paid by the attendee. Commitment to the program may be stronger if there is some cost to individual attendees who have the ability to pay.

Factors to be considered in establishing such a program would include (1) job opportunities and employment needs in the community; (2) community unemployment levels; and (3) the lack of alternative and comparable training institutions. The program should accept attendees at a rate commensurate with their representation in the community.

By engaging in this program, the contractor or facility involved would be exempted from compliance reviews for a three-year period. However, a review could be stimulated by meritorious complaints of noncompliance, *i.e.*, complaints which demonstrate on their face or through supporting affidavits that immediate and irreparable injury, loss, or damage will occur if the complaint is not processed immediately.

3. Urban Enterprize Zones

Contractors which open a new facility in an Urban Enterprise Zone would recieve an exemption from compliance reviews for such a facility for a period of five years. To satisfy this exemption, the new facility would have to meet any statutory requirements governing corporate facilities in Urban Zones.

4. Activities Not Related to Representation

Not all of the affirmative action activities which a contractor can engage in will have a direct, tangible impact on minority and female representation within its workforce. Programs designed to benefit community employment levels, teach the structurally unemployed, or assist existing employees in their development towards future promotion are but a few of the activities which can not be readily measured by simply focusing on a contractor's employment levels, yet they are significant positive steps towards the overall goal of the contract compliance program. OFCCP should encourage these efforts and not simply dismiss them because they do not readily fit within its current regulatory structure.

C. Jurisdictional Thresholds Can Be Inclusive Not Exclusive If Reporting Requirements Vary According to Contractor Size

Currently, the Executive Order obligations apply to all federal contractors and subcontractors with a contract or subcontract of $10,000 or more. Contractors or subcontractors with a contract or subcontract of $50,000 or more and with 50 or more employees must maintain a written affirmative action program containing hiring goals and timetables at each of its establishments.

As noted above, the Department of Labor is proposing to raise the AAP threshold to a contractor or subcontractor with a contract of $1 million or more and with 250 or more employees.

The overall benefit of the Executive Order program is its general effect of making large numbers of employers "affirmative action conscious." In itself, this is neither burdensome nor undersirable, but current regulations place burdensome and unnecessary requirements on all contractors. The solution, however, is not to exempt smaller employers from Executive Order coverage but to meet these objections by making the requirements more rational and less burdensome by varying recordkeeping requirements according to contractor size to insure that small contractors or small facilities of large contractors are not unduly burdened. The Department of Labor's proposed short form AAP is a positive first step, but more is needed.

D. The Standard of Compliance Should be the Nature and Extent of the Contractors Overall Good Faith Efforts

Although the program currently states that all that is required of contractors and subcontractors is that they make all good faith efforts to fulfil the Order's obligations, in reality whether a goal is achieved is the determinative criterion.

Discrimination issues, as noted above, should be divorced from the compliance review process so that the focus is on monitoring affirmative action achievement. Meeting goals should not be the sole criterion for determining compliance. It should be the contractor's overall good faith efforts to achieve equal employment opportunity. This principle already appears in the regulations, but it should be strengthened as past practice has been to stress goal achievement at the expense of virtually everything else. Moreover, the stress should be upon constructive advice and assistance from OFCCP, rather than the present confrontational, prosecutorial approach. The object should be to help a contractor find effective ways of enhancing minority and female opportunities, not to cast blame and demand penalties. More recognition should be given to the contractor's special efforts to foster the upward mobility of minorities and women. These can be as broad ranging as support of national efforts, such as the National Action Council for Minorities in Engineering, or as local as activities such as Youth Motivation Task Forces. Recognition of this type of activity will promote job opportunities, the true measure of affirmative action.

E. Inconsistent Legal Standards

In addition, OFCCP has contended that the Executive Order program is contractual in nature and therefore not subject to the statutory restrictions contained in Title VII. The Executive Order should not be interpreted as declaring unlawful that which

Congress has chosen to protect (e.g., bona fide seniority systems) or demand in the name of nondiscrimination that which Congress has not made a requirement of Title VII (e.g., numerical parity). The antidiscrimination language of the Executive Order, as amended, is identical to the prohibitionary language of Title VII and, thus, the Order should not contemplate a broader meaning to the prohibition than that obtainable under Title VII. Accordingly, the program should be amended so that the meaning of discrimination under the Executive Order would be coextensive with its meaning under Title VII and the Equal Pay Act, and OFCCP would be precluded from declaring unlawful under the Order any conduct protected by those statutes.

F. A Neutral, Objective System should be Incorporated which Would Prevent Selection of Contractors for Compliance Reviews Solely on the Basis of a Decision by Individual Compliance Officers.

Currently, OFCCP states that contractors are selected for review based upon their size, the number of job opportunities involved, or the filing of complaints of discrimination against specific contractors. In private, however, agency officials concede that contractors are often selected on the basis of the personal feelings of the compliance officer involved and without regard to the number of times a contractor or facility has been reviewed in the past.

The program should be revised to establish a targeting system capable of ensuring that those contractors with the lowest comparative utilization of women and minorities are reviewed first. In analyzing utilization figures, a company would be compared not with nation-wide or industry-wide averages, but rather with average utilization figures for companies which hire employees who posses approximately the same skill levels and are drawn from the same labor market. Adjustments for unique circumstances would have to be built into the targeting program such as, for example, when a contractor making satisfactory EEO progress looks "bad" only because of the extraordinary efforts undertaken by companies with which it is being compared. The utilization data would be drawn from EEO-1 forms.

Moreover, efforts should be made to insure that reviews are distributed throughout the contractor universe in terms of industry or business, size and geographic location and some provision should be made for randomness. Also,priority should be given to the facilities or subdivisions of a contractor which actually possess federal contracts. Finally, to prevent the repetitiveness of the current selection process, contractors or facilities that have been reviewed would not be reviewed again for a 24 month period, except in unusual circumstances.

G. Compliance Reviews and Data Requests should not be Arbitrary Procedures But should Proceed in a manner Capable of Preventing Unnecessary Regulatory Burden on Contractors of All Sizes and Protecting Contractors in Compliance from Protracted Investigations.

Once a contractor has been selected for a compliance review, OFCCP currently requires submission of the contractor's or facility's affirmative action programs and voluminous support data. This requirement is routine and no consideration is given to a contractor's past history of compliance or the agency's ability to analyze the requested data.

The program should be amended so that the compliance review is conducted in a manner which minimizes the paperwork burden on government and industry. Data requests could be modeled after IRS tax audits in which minimal information is required initially (*i.e.*, 1040 forms) and additional information pertaining to identified problem areas is requested sequentially as the need for it arises during an audit.

Once selected for review, a contractor would be provided with an explanation of how and why it was selected. Initially, it would only need to submit its analysis of its progress under its affirmative action program. If the OFCCP determines, on the basis of a statistically valid measure, that the contractor employed minorities and women in reasonable proportion to their presence in the qualified workforce, the compliance review would end and the agency would notify the contractor or facility of such findings.

If this standard is not met, the contractor would submit its entire affirmative action program and the review would proceed in conjunction with the principles outlined above.

E. The Definition of a Job Group, the Determination of Availability and Underutilization, and the Requirements for Goals and Timetables Should be Amended in Order to Accommodate the Unique Characteristics of a Contractor's Workforce.

The significance of these required components of affirmative action programs depends, in large part, on whether the federal contract compliance program is made prospective. If it is, the Administration will be better able to develop a consensus on a more constructive approach to the details of affirmative action planning.

1. Job Groups

Contractors are required to divide all the jobs in their workforces into groups based on content, wage and opportunity similarity. These job groups serve as the first half of the comparison (availability being the second) used to determine whether a contractor is underutilized and goals are required. Unfortunately, as enforced, this segmentation is often too small or fails to reflect a contractor's organizational and occupational structure, especially if that structure is unique.

The job group concept is elusive and breeds controversy. Contractors should be permitted to do AAP analyses on the basis of broad EEO-1 categories. Problems of concentrations of minorities and females in the lower paying or dead end jobs within a particular EEO-1 category will be adequately revealed by the workforce analysis, in which each job title is listed by department and line of progression from lowest to highest paid. However, contractors should have the option of performing AAP analysis by any job group classification system that reflects internal workforce realities if they do not elect to use the EEO-1 categories.

2. Availability

The determination of availability is one of the most important yet constroversial aspects of any affirmative action program because of the unresolved confusion as to its definition and purpose. As defined by OFCCP, availability is the number of minorities and women who have the necessary skills required for entry into a job group, or who are capable of acquiring them. Contractors normally define availability in terms of those who possess the necessary skills and interest to fill an opening. The two definitions are antipodal; one focuses on current skill possession, while the other is based on a person's capabilities, an extremely difficult feature to measure.

This definitional difference is critical because of the ways in which availability is used. It serves, first, as the standard against which a contractor's current minority and female representation is measured and, second, as a basis for setting goals. If availability is defined in terms of all those who may become capable of performing a job, it has little relevancy as a measure of whether a contractor is currently hiring already qualified minorities and women in a non-discriminatory fashion. OFCCP contends that its inflated definition is necessary to correct the historical discrimination reflected in the current distribution of skills within the labor force. As a result, availability often represents a negotiated compromise between the contractor's estimate of the number of minorities and women acqually qualified for a job and the government's estimate of the number of minorities and women who would be available absent discrimination.

The program should be amended so that the determination of availability reflects more accurately the current distribution of skills among individuals. The required consideration of the eight factors prescribed in the agency's regulations should be replaced by provisions which assist and not hinder an accurate estimation of the availability of minorities and women who have the necessary skills and interest to be considered for a job opening.

3. Underutilization

OFCCP currently defines underutilization as occurring whereover a contractor or subcontractor employs minorities and women at a rate less than their availability. Even if this difference is just a fraction, it is considered by the agency to establish underutilization. Once underutilization is found, annual and ultimate hiring goals must be established.

The Department's proposal to replace the traditional "any numerical difference" standard for determining underutilization with an 80% range of acceptability is a desirable initial step. Unfortunately, the advantage of using a percentile range to ensure flexibility in determining underutilization depends in large part on the size of the job group in question and the appropriate availability. For small job groups with low availability, the 80% range still raises the possibility of a contractor being required to set a goal for fractional persons. Accordingly, the program should be revised so that contractors would be required to declare underutilization and establish goals only in situations where the 80% rule for underutilization has been violated and the contractor is at least one full person away from being fully utilized.

4. Goals and Timetables

OFCCP requires contractors to set goals and timetables for hiring and promoting minorities and women at levels that it acknowledges exceed their current availability in the labor market. The agency feels that these inflated levels are necessary to stimulate change and that contractors must assume the burden of increasing availability levels. Consequently, it frequently is impossible for companies to be in full compliance with the government's goal requirements. Also, timetables must be established to accomplish the goals in "the shortest feasible time period." This also is a highly speculative assessment. Since failure to accomplish 95% of a goal in the time projected results in additional scrutiny of the contractor's employment policies, the present system of goals and timetables operates more as a quota than a goal.

The program should be amended so that goals would be set annually at a rate not less than current availability (i.e., the number or percentage of minorities and women in the relevant labor market who possess the skills and interest to perform the job in question). There would be no requirement to establish timetables in which goals must be achieved nor for ultimate goals. As under the existing Order, where a contractor has established goals and has been unable to achieve them, it would be provided an opportunity to demonstrate that a good faith effort to meet them had been made.

CONCLUSION

As this country enters into the second decade of regulation by the OFCCP, it is important to remember that many of the problems confronting the contract compliance program at its inception are not the same as those which are troubling it today. The necessity for ending employment discrimination and for affirmative action is no longer at issue and many of the occupational barriers impeding the job mobility of minorities and women have been removed. What is needed today, however, is a forthright discussion of how OFCCP can best serve its objective of increasing employment opportunities for all protected group members, a discussion which this Committee has helped to foster through your hearings.

Our statement has been highly critical of OFCCP, but such criticism by all who are involved in affirmative action is necessary for there to be improvement. For EEAC's members, all of whom are committed to the concepts of equal employment opportunity and affirmative action, only a program that encourages contractor participation, innovation and performance can achieve the worthy objectives of Executive Order 11246. Employment is furnished by employers, and if equal opportunity in that employment is to be achieved, it must be supplied by employers, working with the federal government and protected groups. We at EEAC strongly believe that a program based upon our suggestions can accomplish this result and make the second generation of equal employment opportunity a positive, beneficial and productive experience.

NABW
National Association of Bank Women, Inc.
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TESTIMONY: HEARINGS ON AFFIRMATIVE ACTION
December 1981

The National Association of Bank Women, Inc.(NABW) is the only national association of women in the banking industry, representing 27,000 women officers and managers.* It was founded in 1921.

We appreciate this opportunity to present our views and would also like to be heard in somewhat more detail should the Committtee hold further hearings.While we have worked in the past with OFCCP and have offered testimony at similar hearings, particularly a series held by Senator Proxmire in recent years, our views were not sought by OFCCP in the recent revision work nor was our name apparently passed on to Senator Hatch's committee by the Labor Department.

Our primary concerns relate to several issues surrounding the revision of Affirmative Action regulations.

Issue #1 Affirmative Action: is it needed at all? There is no doubt in our minds that affirmative action was responsible for much of the progress women and minorities made in the banking industry during the decade of the 70's. Without a strong program, women will not only be greatly hampered in their further progress but will also lose many of the gains that have been so painstakingly made. We can already see evidence of this just since the emphasis has been taken off Affirmative Action with the arrival of the new administration.

It is not sufficient merely to have mechanisms for women to file complaints if they feel they are experiencing discrimination. There must be a proactive agency which creates a priority reason for corporations to make opportunities available to women and minorities. This issue is simply not by itself a high priority in most organizations.

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* as well as a number of male bankers.

TESTIMONY: HEARINGS ON AFFIRMATIVE ACTION
December 1981

Issue #2) What size companies should have to have written affirmative action plans?

The proposal which would require written plans only from organizations with 250 employees or more has particular negative impact in banking because large numbers of women in our industry work in smaller banks. These banks need special help with their planning for the utilization of women and minorities.

The larger banks have been the object of considerable OFCCP attention in the past. They have addressed the needs of women and minorities to a greater degree than have the smaller banks. Failure to include the latter would have a profound effect upon the careers of many thousands of their employees.

Issue #3) The Labor Department has proposed that only companies which hold one (or more) individual contract/s valued at $1 million should be required to submit an affirmative action plan.

This proposal, if enacted, might well eliminate many of the same sized banks we mentioned earlier. We would like to see statistics that would demonstrate the net effect of changing the current regulation.

Issue #4) The proposed five-year exemption from review of employers whose written plans have been previously approved. Five years is too long because banking's workforce changes constantly. Some sort of reasonable review should be scheduled earlier.

Issue #5) Third-party complaints would only be allowed if those who feel they have been discriminated against are revealed. Such a regulation puts an employee at a grave disadvantage; her career will surely be adversely affected. There is no question in the minds of women that many employers would find it difficult to remain objective if charges of discrimination are brought.

However, we would be in favor of developing a better means of determining the credibility of the charge so that employers are not unfairly left with the entire burden of proof.

TESTIMONY: HEARINGS ON AFFIRMATIVE ACTION
December 1981

Issue #6) The burdensome and expensive effect of over-complicated AA reporting procedures.

Many of NABW's members are responsible for affirmative action in their banks. They are convinced that a proactive program is necessary on the part of the federal government. However, they are also deeply concerned about the cumbersome procedures which frequently make the process much too costly and sometimes result in having the opposite effect of that intended.

The attitude on the part of the agency responsible for AA needs to be less that of adversary to banks and more that of cooperative oversight.

NABW's members are themselves a part of bank management. We are concerned that a process that is fair and equitable to all be developed for measuring individual banks' efforts in affirmative action.

Banking is going to need to use the talents of all its personnel in the decade ahead. An affirmative action program that is reasonable and consistent in its approach will be as good for banking as it will be for the women and minorities who make up the largest part of the banking workforce.

Phyllis M. Haeger

Phyllis M. Haeger
Executive Vice President
National Association of
Bank Women, Inc.

Working Women
A NATIONAL ASSOCIATION OF OFFICE WORKERS

CAMPAIGN TO DEFEND
WORKING WOMEN'S RIGHTS
1981 [illegible] 22 PM 2:33

December 18, 1981

Honorable Orrin G. Hatch
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Senator Hatch:

Working Women appreciates this opportunity to express our views on how employment opportunities for women and minorities can be improved. There are several simple steps that can be taken by the Department of Labor to ease the burbon on business while bringing the benefits of Affirmative Action to all:

--Target the healthy, growing industries for vigerous enforcement. The office and service industries, with their burgeoning job opportunities, are ideal places to implement Affirmative Action with few repercussions on white male employees or recruitment difficulties.

--Simplify reporting procedures. Stress an annual summary report that breaks down the workforce by sex, race, and salary level.

--Use the full range of remedies and sanctions available--including back pay and debarment--as an incentive to compliance.

--Emphasize the institution of fair employment practices that have company-wide benefits.

Again thank you for this opportunity, and we hope that you will give our suggestions serious consideration.

Sincerely,

Wanda Flowers

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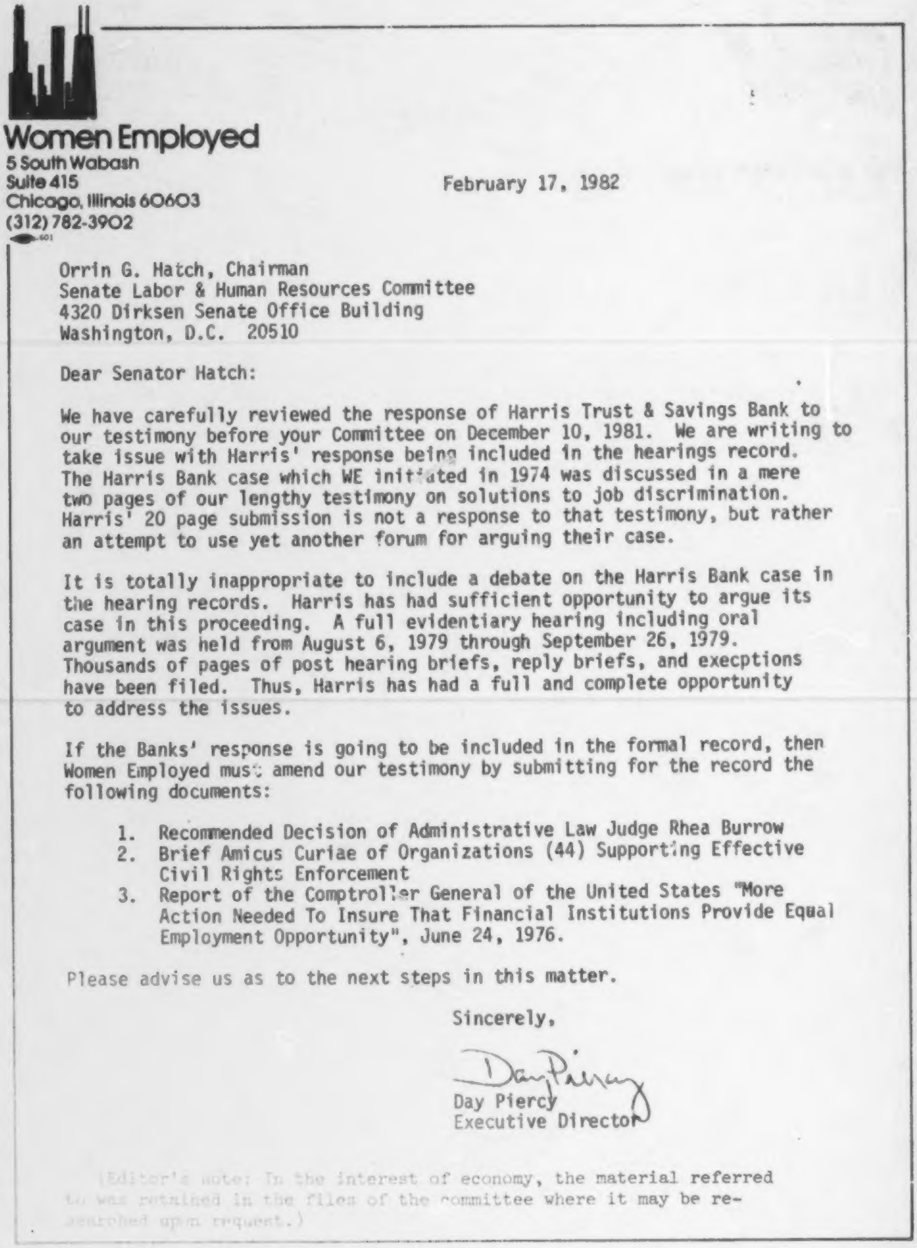

Women Employed
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Chicago, Illinois 60603
(312) 782-3902

February 17, 1982

Orrin G. Hatch, Chairman
Senate Labor & Human Resources Committee
4320 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

We have carefully reviewed the response of Harris Trust & Savings Bank to our testimony before your Committee on December 10, 1981. We are writing to take issue with Harris' response being included in the hearings record. The Harris Bank case which WE initiated in 1974 was discussed in a mere two pages of our lengthy testimony on solutions to job discrimination. Harris' 20 page submission is not a response to that testimony, but rather an attempt to use yet another forum for arguing their case.

It is totally inappropriate to include a debate on the Harris Bank case in the hearing records. Harris has had sufficient opportunity to argue its case in this proceeding. A full evidentiary hearing including oral argument was held from August 6, 1979 through September 26, 1979. Thousands of pages of post hearing briefs, reply briefs, and execptions have been filed. Thus, Harris has had a full and complete opportunity to address the issues.

If the Banks' response is going to be included in the formal record, then Women Employed must amend our testimony by submitting for the record the following documents:

1. Recommended Decision of Administrative Law Judge Rhea Burrow
2. Brief Amicus Curiae of Organizations (44) Supporting Effective Civil Rights Enforcement
3. Report of the Comptroller General of the United States "More Action Needed To Insure That Financial Institutions Provide Equal Employment Opportunity", June 24, 1976.

Please advise us as to the next steps in this matter.

Sincerely,

Day Piercy

Day Piercy
Executive Director

(Editor's note: In the interest of economy, the material referred to was retained in the files of the committee where it may be researched upon request.)

Chamber of Commerce of the United States
HUMAN AND COMMUNITY RESOURCES DIVISION
LABOR LAW SECTION
202-659-6104
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

November 5, 1981

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human
Resources
United States Senate
Dirksen Senate Office Building
Room 4220
Washington, D.C. 20510

Dear Chairman Hatch:

Pursuant to your request, attached are the answers of the U.S. Chamber of Commerce to the written questions submitted for our response during the October 22, 1981 OFCCP oversight hearing.

Sincerely,

Robert T. Thompson

Robert T. Thompson

Enclosure

1. Q. Mr. Thompson, you've pointed out that OFCCP's requirements for written affirmative action are incredibly complex. Is it reasonable for a smaller contractor to be able to understand their requirements, let alone comply with them?

A. It is extremely difficult for a smaller contractor to understand the requirements for written affirmative action plans. When you add to this the arbitrary manner in which OFCCP compliance officers routinely interpret the requirements, a small contractor simply has no way of knowing whether he is in compliance or not.

These unfair burdens on smaller contractors are another example of how OFCCP enforcement of the Program frustrates its objectives.

2. Q. Mr. Thompson, do you have any evidence that OFCCP's administration and enforcement of the affirmative action program has actually helped achieve increased hiring and promotional opportunities for women and minorities?

A. On the contrary, we are aware of no evidence that shows that OFCCP's administration and enforcement of the program have advanced employment opportunities for minorities and women. In fact, OFCCP's primary focus -- in seeking retroactive relief and debarring allegedly noncomplying contractors -- emphasizes punishment and retribution rather than affirmative action. The attitude has been how many employers can we penalize rather than how can we advance employment opportunities for minorities and women.

3. Q. OFCCP contends their goals and timetables are not quotas. Do you agree?

A. As we pointed out in our statement, the distinction between goals and timetables and quotas is easily blurred. Because OFCCP's enforcement of the program focuses on numbers, and how those numbers are achieved, it is extremely questionable whether a contractor views them as anything other than quotas. Even though the program is intended to recognize the "good faith efforts" of contractors in meeting goals and timetables, in practice OFCCP has given little credence to these efforts.

4. Q. We constantly hear that OFCCP harrassment of contractors are isolated instances and can be corrected on an individual basis. As the representative of one of the largest business memberships in this country, could you tell us what has been the experience of your members?

A. Again, as we pointed out in our statement, the experience of our members shows that rather than being isolated, OFCCP's harassment of contractors and the arbitrary actions of its compliance are virtually universal. The comments from contractors cited in our statement are typical of those we receive on a routine basis.

5. Q. We hear that the business communities concern for regulator relief is a "paper smoke screen" for not wanting to press foreward with affirmative action efforts. Could you comment on that?

A. It has been the practice of OFCCP to view contractors with uniform distrust. In other words, the agency takes the view that but for its efforts, all contractors would intentionally discriminate against minorities and women and would do nothing to advance employment opportunities for these individuals.

This attitude is, unfortunately, light years behind reality. Contractors long since have come to recognize the value of advancing these opportunities and have for the most part undertaken voluntary efforts in varying degrees to achieve these objectives. Today it is simply a matter of good business sense.

The only smoke screen involved today is created by the fire which OFCCP has ignited in its unreasonable and arbitrary enforcement of the program.

The CHAIRMAN. Thank you so much. With that, we will recess these hearings until the next order of the Chair.

[Whereupon, at 11:55 a.m., the hearing was recessed, subject to the call of the Chair.]

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